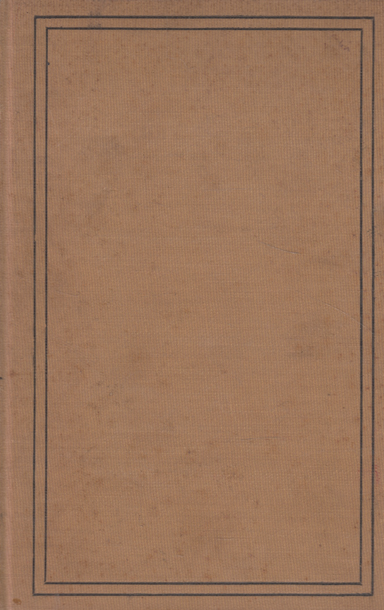








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

FEBRUARY 20, 1928 (IN PART), TO MAY 31, 1928

WITH

ABSTRACT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

EWART W. HOBBS

VOLUME LXV

UNITED STATES
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Assistant Clerk

FRED C. KLEINSCHMIDT

Bailiff

J. J. MARCOTTE

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(Charged with the defense of the Government)

HERMAN J. GALLOWAY

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[1] Succeeding Chief Justice Edward K. Campbell, who resigned, effective Apr. 22, 1928. Chief Justice Booth took the oath of office and assumed the duties thereof Apr. 23, 1928.

[2] Appointed to fill the vacancy caused by the resignation of Judge James Hay. Judge Green took the oath of office and entered upon his duties Apr. 2, 1928.

[3] Appointed to fill the vacancy caused by the elevation of Judge Fenton W. Booth. Judge Sinnott took the oath of office and entered upon his duties May 31, 1928.



COMMISSIONERS

(Act of February 24, 1925, 43 Stat. 964; Public Resolution No. 4, 70th Cong., approved January 11, 1928)

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CASES DECIDED

IN

THE COURT OF CLAIMS

FEBRUARY 20, 1928 (IN PART)
TO AND INCLUDING MAY 31, 1928

KESSLER MOTOR COMPANY v. THE UNITED STATES

[No. E-219]

On the Proofs

Contracts; experimental work continuing to date of cancellation; recovery of expenses.—Where Government contracts involving experimental work in the manufacture of airplane engines provide for deliveries on certain dates, and both parties down to the date of cancellation disregard the dates of delivery and treat the contracts as continuing, the contractor is entitled to the sum expended by it with the consent and approval of the Government in the construction and production of the articles named.

The Reporter's statement of the case:

Messrs. William S. McDowell and *Ashby Williams* for the plaintiff.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. James J. Lenihan* for defendant on the second trial.

Decided June 6, 1927. Motion for new trial allowed March 5, 1928. On the second trial judgment was, on June 18, 1928, entered for the original amount and the findings of fact and opinion theretofore filed were allowed to stand.

I. The plaintiff is a corporation duly organized and existing under the laws of the State of Colorado, having its principal office and place of business in the city of Detroit,

Michigan, and duly licensed thereunto by the State of Michigan to conduct business therein.

II. Stock in the plaintiff corporation is owned by divers persons who are citizens of the United States, residing in the several States of the Union, all of whom, as well as the plaintiff, have at all times borne true allegiance to the Government of the United States, and said stockholders themselves and the plaintiff corporation have not aided, abetted, or given encouragement to the enemies of the Government of the United States or encouragement to any rebellion against said Government.

III. For some time prior to the events hereinafter mentioned the plaintiff company had been engaged in certain experiments in the field of internal-combustion engines, had obtained patents on the results of their experiments, and had been engaged in the manufacture of said engines.

IV. On June 5, 1917, the plaintiff received from the office of the Chief Signal Officer, War Department, order No. 8128 calling for the construction of four six-cylinder 200 h. p. Kessler engines, per specifications furnished May 11, 1917, at the rate of $6,000.00 each, and four four-cylinder 135 h. p. Kessler engines, as per specifications of May 11, 1917, at $4,000.00 each, the total order amounting to $40,000.00. The said engines according to the order were to be ready for inspection within six months from date of order. This order was followed by a contract as of the same date, duly executed and bearing No. 1417. The contract required delivery on or before December 3, 1917.

V. On November 15, 1917, the said contract No. 1417 was amended by adding thereto another article by which the defendant agreed to furnish the plaintiff with $10,000.00 worth of materials, supplies, and parts to be used in the production of articles contracted for, the said amount to be deducted from the amount to be paid as heretofore set forth.

Said contract No. 1417 was again amended by a supplemental agreement dated April 10, 1918, by which it was stated that in consideration of the defendant having furnished the plaintiff with materials to the value of $7,500.00, the amount due under the contract was further reduced by this additional amount.

The originals of the order, contract, and two amendments thereto were attached to and made a part of the petition, and are made a part of these findings by reference.

VI. Under date of July 20, 1917, the plaintiff received from the office of the Chief Signal Officer an order for the manufacture of five special Kessler double-volume aviation engines at the rate of $25,000.00 each, or a total of $125,000.00, one of the said engines to be furnished within approximately 90 days and the other four within 120 days. This order was followed by a contract embracing the same subject matter, which contract was dated July 23, 1917, and bore No. 1485.

This said contract No. 1485 was thereafter, on November 15, 1917, amended by adding thereto an article in which it was agreed by the defendant to furnish the plaintiff $40,000.00 worth of materials, supplies, and parts to be used in the production of the articles contracted for, said amount to be deducted from the price heretofore named.

Again, the said contract No. 1485 was by supplemental agreement dated April 1, 1918, amended so as to provide that in consideration of the defendant having furnished the plaintiff with materials to the amount of $17,500.00, the contract price to be paid by the defendant was in that amount further reduced from the original contract price.

The originals of the order, contract, and two amendments thereto were attached to and made a part of the petition, and are made a part of these findings by reference.

VII. Under date of August 23, 1917, the plaintiff received from the office of the Chief Signal Officer, order No. K-9661 for the following:

Item:		
1	1 complete 4-cylinder Kessler engine, unassembled	$4,000.00
2	1 complete 6-cylinder Kessler engine, unassembled	6,000.00
3	12 inlet valves, at $8.00 each	96.00
4	12 exhaust valves, at $8.00 each	96.00
5	24 valve stems, at $1.00 each	24.00
6	24 piston rings, at $2.00 each	48.00
7	12 rocker arms, at $12.00 each	144.00
8	5 sets of gaskets for 4-cylinder engine, at $164.00 each	820.00
9	5 sets of gaskets for 6-cylinder engine, at $246.00 each	1,230.00
	Total	12,458.00

Delivery of these items was to be made on or before December 5, the shipment to be made with the engines on order No. 8128.

This said order No. K–9661 was thereafter, on August 27, 1917, duly followed by contract No. 1589.

VIII. The said contract No. 1589 was thereafter amended by the addition of an article by which it was agreed that the defendant would furnish the plaintiff with $3,000.00 worth of materials, supplies, and parts to be used in the production of the articles therein contracted for, the said amount to be deducted from the original amount to be paid by the defendant under the terms of the order.

The originals of the order, contract, and amendment thereto were attached to and made a part of the petition, and are made a part of these findings by reference.

IX. On November 15, 1917, a further contract bearing No. 2226 was entered into between defendant through the Signal Corps and the plaintiff in which it recited the existence of contracts Nos. 1417, 1485, and 1589, and in which it was agreed by the defendant to buy and the plaintiff to sell certain materials, supplies, and parts for the production of the motors and parts thereof agreed to be delivered to the defendant under the said terms of the three contracts and for which transfer of title the defendant agreed to pay the sum of $53,000.00.

The subject matter of this contract represents parts which either had been used and broken up or those which were later removed by the defendant.

It was recited in said contract that the same had been preceded by an order No. 30,062.

X. On April 4, 1918, the plaintiff received from the office of the Chief Signal Officer order No. 30,657, in which it was directed to furnish certain named parts required in connection with the manufacture of the special 400 h. p. Kessler double-volume aviation engine under order No. 8783, contract No. 1485; certain parts required in connection with the manufacture of special 200 h. p. Kessler engine under order No. 8128, contract No. 1417; certain parts required in connection with the manufacture of special 135 h. p. Kessler engine

under order No. 8128, contract No. 1417; and such other materials, parts, etc., as might be required in connection with the manufacture of engines and parts under order No. 8783, contract 1485; order No. 8128, contract No. 1417; and order No. K–9661, contract No. 1589; price to be paid for the whole being $25,000.00.

This order was followed by an agreement bearing No. 3505 and predated to April 1, 1918, in which the existence of the said three contracts was recited, and by which latter agreement the defendant agreed to buy and the plaintiff to sell the materials named in said order in consideration of which the defendant agreed to pay to the plaintiff the sum of $25,000.00. This sum the plaintiff agreed to deposit in a separate account to be drawn against only on check signed by itself and a Signal Corps representative, said fund to be used only to pay expenses occurring in connection with the said three contracts.

It was further recited in said contract that contracts Nos. 1417 and 1485 be by the same modified by deducting the amount of the purchase price of the property therein transferred from the prices due under the said two contracts.

XI. The only amounts which the plaintiff has received for work done under the first three named contracts is the total sum of $78,000.00 consisting of the two items of $25,000.00 as named in contract No. 3505 and $53,000.00 named in contract No. 2226.

The $53,000.00 payment was made by the furnishing of materials as recited in the amendments to contracts Nos. 1417, 1485, and 1589, dated November 15, 1917, valued at $10,000.00, $40,000.00, and $3,000.00, respectively.

The $25,000.00 payment was made by the furnishing of materials as recited in the amendment to contract No. 1417 dated April 10, 1918, valued at $7,500.00, and in the amendment to contract No. 1485 dated April 1, 1918, valued at $17,500.00.

XII. The plaintiff immediately on receipt of the original orders and contracts above referred to commenced work on the various items named therein and continued the same up to and including April 10, 1919, on which date it received

from the defendant a telegram canceling the said orders and contracts.

XIII. Work on the articles named in said contracts was of an experimental nature designedly for the purpose of providing the aviation service with an advanced type of motor. These engines were, during the period involved, being continuously constructed, tested, torn down, redesigned, and reconstructed. This work was at all times during said period known by the defendant to be progressing in the form indicated, and changes in design both material and superficial and changes in the materials used were from time to time directed by the defendant and complied with by the plaintiff. Likewise, changes in design were made by the plaintiff from time to time and submitted to the defendant, some of which were incorporated in the resulting article manufactured. At the date of the cancellation of said contracts none of the articles named had been accepted by or delivered to the defendant, the experimental work thereon not having been completed.

XIV. The plaintiff presented its claim to the War Claims Board and afterwards filed a petition for review from the decision of said board disallowing said claim. Thereafter the Secretary of War on October 9, 1920, disallowed the claim, affirming the decision of the board.

XV. The total amount expended by the plaintiff in the construction and production of the articles named was $131,454.86. Deducting from this the amount of $78,000.00 paid by the defendant, as heretofore set forth, there is indicated a loss to the plaintiff under work done on this contract amounting to $53,454.86.

The court decided that plaintiff was entitled to recover.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover from the United States the sum of $53,454.86. The facts are fully set forth in the findings, and it is not necessary to recapitulate them here.

While the contracts between the parties provided for the delivery of specific articles on certain dates, yet both parties down to the date of the cancellation of the contracts treated

them as continuing contracts. The parties by their actions agreed that the contracts were continuing, and had the right so to do. The Government electing to treat them as continuing contracts is bound by them. The plaintiff with the consent and approval of the Government having expended the sum of $131,454.86 in the construction and production of the articles named in the several contracts is entitled to be paid the sum so expended. Of this sum the Government has paid to the plaintiff the sum of $78,000, leaving a balance due to the plaintiff amounting to the sum of $53,454.86. A judgment will be entered for the plaintiff for the sum of $53,454.86. It is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

CALIFORNIA WINE ASSOCIATION OF NEW YORK, INC., v. THE UNITED STATES

[No. E-115. Decided February 20, 1928]

On the Proofs

Internal-revenue laws; compromise; incorrect citations of statutes.—A compromise under sec. 3229, Revised Statutes, of a criminal case arising under the internal-revenue laws, under which plaintiff has made payment of the sum agreed upon, will not be set aside because the parties, in their negotiations, inadvertently made incorrect citations of statutes and regulations thereunder, actual violations of law being admitted, subject to the same penalties.

The Reporter's statement of the case:

Mr. Stanleigh P. Friedman for the plaintiff. *Thomas & Friedman* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, California Wine Association of New York, Inc., was at the times hereinafter mentioned a duly organ-

ized and existing corporation under and by virtue of the laws of the State of New York, and engaged in the business of manufacturing and selling wines and as a bonded winery, with its principal place of business in the Borough of Manhattan, city, county, and State of New York. Said corporation was at all times a subsidiary of the California Wine Association, a California corporation, with its principal office in the city of San Francisco, State of California, which corporation had been in existence for more than twenty-five years, conducting a wholesale wine business.

II. In the early part of 1920 the Commissioner of Internal Revenue made an investigation of the business of plaintiff corporation and as a result of this investigation plaintiff corporation was charged with forty-one violations of article 19, Regulations 28, supplement 2, issued pursuant to authority granted the Commissioner of Internal Revenue by section 402, act of September 8, 1916. Plaintiff corporation was charged by the Commissioner of Internal Revenue with making forty-one false entries in Form 702 during the months of October, November, and December, 1919. Form 702 was a daily record required by Regulations 28 to be kept by the proprietors of bonded wine rooms. Such record was required to show, among other things, the quantity of wine withdrawn from bond, the amount of wine tax paid upon withdrawal, and the name of the consignee for whom the wine was withdrawn.

III. No criminal charge of any kind was made against plaintiff corporation in any of the courts of the United States.

IV. On or about the 10th day of January, 1920, plaintiff corporation applied to the Collector of Internal Revenue for the First District of New York and to the Collector of Internal Revenue for the Second District of New York for a permit to deal in nonbeverage wines under the national prohibition act, dated October 28, 1919.

V. Plaintiff's application for a permit to deal in nonbeverage wines under the national prohibition act was denied on the ground that the company was charged with violation of article 19, Regulations 28, supplement 2, issued pursuant to authority granted the Commissioner of Internal

Revenue by section 402, act of September 8, 1916, more fully set out in Finding II hereof.

Several conferences were had between the representatives of the Prohibition Unit and the Internal Revenue Department and representatives of plaintiff corporation in reference to the charges and the application for a permit to engage in business under the national prohibition act.

VI. As a result of conferences between the representatives of plaintiff corporation and representatives of the Government, on April 24, 1920, plaintiff corporation offered the sum of $5,000 in compromise of the alleged violations, and sent the following letter to the Commissioner of Internal Revenue:

APRIL 24, 1920.

Hon. WILLIAM H. EDWARDS,
Collector of Internal Revenue,
Customhouse, New York City.

DEAR SIR: California Wine Association of New York, Inc., a New York corporation, which is a subsidiary of California Wine Association, a California corporation, has been charged with certain irregularities involving violation of the war-time prohibition act and also violation of the internal revenue laws of the United States. The violations charged consist of the sale of wine to persons other than those mentioned in the permits which were obtained for the sale of wine for sacramental purposes.

We realize that there can be no compromise of any case, either civil or criminal, arising under the war-time prohibition act. The complaint, however, if well founded, also involves a violation of the internal-revenue laws in that the corporation reported on Form 702 the sale of wine, for example, to the Christian Press Association, whereas it is charged the wine was delivered to parties other than the Christian Press Association. If such a violation has been committed, it may be compromised by the Commissioner of Internal Revenue under section 3229 of the Revised Statutes as a criminal case arising under the internal-revenue laws. We understand that there is no claim by the Government that the corporation has involved itself in any civil liability to the Government.

After discussion of the evidence with the Government agents in charge of the case the corporation removed at once all of the officers connected with the corporation at the time of the alleged violations who were charged with making a false return and committing the other illegal acts. The

entire management of the corporation has now been placed in reliable hands.

The corporation, without necessarily admitting guilt in the premises, desires to effect an adjustment with the Commissioner of Internal Revenue for the alleged violations of the internal-revenue laws connected with the filing of its return on Form 702. To this end we make the following offer of compromise of the alleged criminal violation of the internal-revenue laws under section 3229 of the Revised Statutes. The corporation now offers and incloses to the Commissioner of Internal Revenue a certified check in the sum of five thousand dollars in compromise of this alleged violation.

It should be borne in mind in this connection that there has been no evasion of taxes nor is there any claim that the Government has been defrauded in any way of any taxes or other sums which the corporation was legally bound to pay. The corporation regrets the necessity for the Government's investigation of this matter, of the causes of which it was in complete ignorance, and urges upon the commissioner the thought that any violation was the result of the unauthorized action of officers who, if the violations are true, have proved themselves entirely unworthy of the trust that was reposed in them. As stated above, all of the officers who are charged with responsibility for the alleged violations were immediately removed from office on receipt of the information from the Government agents and have now absolutely no connection with the corporation or its management. The corporation assures the commissioner that under its present management it will be governed strictly in accordance with law.

It is requested that this offer be forwarded to the commissioner through the proper channels.

Very truly yours,

CALIFORNIA WINE ASSOCIATION OF NEW YORK, INC.,
(Signed) B. KAHNWEILER, *President.*

Under date of May 25, 1920, the Commissioner of Internal Revenue rejected the offer of $5,000, and John F. Kramer, Prohibition Commissioner, wrote plaintiff the following letter:

WASHINGTON, *May 25, 1920.*

CALIFORNIA WINE ASSOCIATION,
Washington & West 11th Streets, New York, N. Y.

GENTLEMEN: The Commissioner of Internal Revenue has considered the offer of $5,000, submitted by you on April 29,

1920, through the collector of internal revenue, second district of New York, in compromise of liability for alleged violation of article 19, Regulations 28, supplement 2, and has decided to reject the same.

In view of all the facts in the case this office does not consider that the amount offered by you is sufficient. After careful consideration of this case it has been decided that no offer in an amount less than $100,000 should be given favorable consideration. In order that you may consider this matter, no further action will be taken in this case for 15 days.

Any additional offer in compromise should be submitted to the Collector of Internal Revenue, Customs House Building, New York City.

Respectfully,

(Signed) JOHN F. KRAMER,
Prohibition Commissioner.

VII. Subsequent to the receipt of the letter dated May 25, 1920, and on the 8th day of June, 1920, a conference between representatives of plaintiff corporation and Government representatives was held in the office of the Solicitor of Internal Revenue in the city of Washington, which conference was attended by H. Bartow Farr, attorney for the plaintiff; Stanleigh P. Friedman, attorney for the plaintiff and secretary of plaintiff corporation; Percy A. Vize, an attorney in the office of the Solicitor of Internal Revenue; Lew M. Noble, assistant to the chief of the law division, prohibition unit; and Benjamin C. Hilliard, jr., an attorney in the Prohibition Unit. At said conference the proposal to enter into a compromise was discussed by the officials present. It was stated by the Government representatives that there had been forty-one violations of article 19, Regulations 28, supplement 2, issued pursuant to authority granted the Commissioner of Internal Revenue by section 402, act of September 8, 1916, and that the penalty for each violation was $5,000, which made a total maximum penalty of $205,000. Mr. Farr and Mr. Friedman, representatives of plaintiff corporation, contended that Regulations 28, supplement 2, article 19, provided only for a sworn monthly report, and that the violations charged would only result in a maximum penalty of $15,000, being three in number, October, November, and December, 1919.

It was also stated at this conference by the representatives of the Government that there were alleged violations of the war-time prohibition act; that these violations could not be compromised, but that a compromise of the violations of Regulations 28, supplement 2, article 19, could be made pursuant to section 3229, Revised Statutes.

No compromise was effected as the result of this conference, but later, and in the afternoon of the same day, plaintiff's representatives were informed by the representatives of the Prohibition Unit that the minimum amount which the Government would accept in compromise was the sum of $50,000.

VIII. Under date of June 19, 1920, plaintiff corporation wrote to the Collector of Internal Revenue for the Second District of New York offering the sum of $50,000 in compromise of the charges growing out of the alleged violations of the internal-revenue laws, which letter read as follows:

JUNE 19, 1920.

Hon. WM. H. EDWARDS,
Collector Internal Revenue,
Second District, New York.

DEAR SIR: We enclose certified check to your order for $45,000.

This check together with certified check for $5,000 received from us May 5th, 1920, and still held by you, makes a total of $50,000, which has been agreed upon with our attorneys by the representative of the Hon. Internal Revenue Commissioner at Washington, D. C., to settle amount of alleged violations referred to in a letter from the Hon. John F. Kramer, dated Washington, D. C., May 25th, 1920, Pro–Legal–31171–P K–E E P.

Respectfully,
CALIFORNIA WINE ASSOCIATION OF NEW YORK,
B. KAHNWEILER, *President.*

Under date of September 10, 1920, the Commissioner of Internal Revenue accepted the offer of $50,000, submitted by plaintiff on June 19, 1920, in compromise of liability for alleged violations of section 402 of the act of September 8, 1916, by letter which read as follows:

WASHINGTON, *September 10, 192—.*

CALIFORNIA WINE ASSOCIATION,
Washington & 11th Streets, New York, N. Y.

GENTLEMEN: The Commissioner of Internal Revenue has considered the offer of $50,000, submitted by you on June 21, 1920, through the collector of internal revenue at New York, New York, in compromise of liability for alleged violation of section 402 of the act of September 8, 1916, and has decided, with the advice and consent of the Secretary of the Treasury, to close the case by the acceptance of your offer, as follows: $50,000 in compromise of liability under the internal-revenue laws; costs, if any, to be paid by you.

Respectfully,

JOHN F. KRAMER,
Prohibition Commissioner.

IX. The $50,000 offered in compromise was forwarded to the Collector of Internal Revenue for the Second District of New York and later covered into the Treasury of the United States. Immediately following the payment of said $50,000 a permit was issued to plaintiff corporation authorizing plaintiff to do business under the national prohibition act. On the same date the Commissioner of Internal Revenue wrote a letter to the United States attorney in New York recommending that no criminal prosecution be instituted against the plaintiff.

X. On or about June 16, 1921, plaintiff corporation filed with the Commissioner of Internal Revenue a claim for refund of the sum of $50,000 paid by plaintiff to the Government in compromise of alleged violations of Regulations 28, supplement 2, article 19, of the internal-revenue regulations, issued pursuant to authority granted the Commissioner of Internal Revenue by the internal-revenue act of September 8, 1916, on the ground that at the time the compromise was effected and the money paid the revenue act of September 8, 1916, had been repealed. Plaintiff's claim for a refund was rejected by the Commissioner of Internal Revenue by letter dated May 8, 1923, as follows:

MAY 8, 1923.

THOMAS & FRIEDMAN,
Attorneys & Counsellors at Law,
2 Rector Street, New York, N. Y.

GENTLEMEN: The petition of the California Wine Association of New York, Inc., for the refund of its offer of

$50,000 in compromise of violations of the internal-revenue laws of the United States and your brief in support thereof have been given careful consideration.

The decision of this office is that your client is not entitled to the relief requested for the following reasons:

1. The original offer of $5,000 was submitted to compromise a violation of the internal-revenue laws of the United States and the subsequent offer of $45,000 was submitted as an additional or supplemental offer to such original offer of $5,000.

2. Reference in certain correspondence to article 19, Regulations 28, supplement 2, issued under the revenue act of 1916, was clearly due to inadvertence. This regulation and law at no time embodied the requirement that resulted in the alleged false returns in question, and could not have been in contemplation of the parties. Such requirement was contained in Treasury Decisions 2788 and 2940, issued under the revenue act of 1918; and in making such false returns under this requirement, the California Wine Association of New York, Inc., violated section 3451, R. S., an internal-revenue law.

3. On June 26, 1920, the Solicitor of Internal Revenue, pursuant to section 3229, R. S., advised the acceptance of such offer of $50,000 in compromise of liability under the internal-revenue laws.

4. On September 7, 1920, also pursuant to section 3229, R. S., the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, accepted the offer of $50,000, "as advised by the Solicitor of Internal Revenue."

If you desire further hearing, your request therefor should be submitted within a reasonable time; otherwise this decision will stand as the final determination of the matter by this office.

Respectfully,

D. H. BLAIR, *Commissioner*.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

This is an action by the California Wine Association of New York, Inc., to recover $50,000 paid to the Government on June 19, 1920, in compromise of penalties for violations of the internal-revenue laws on the ground that the specific statute and the regulations with which plaintiff was charged

with violating were not in force at the time the offenses were committed, but had been repealed several months prior thereto. Plaintiff was charged with forty-one separate and distinct acts, each of which constituted a violation of law under the revenue act of 1916 and Regulations 28, supplement 2, promulgated thereunder.

Proprietors of all "bonded premises" were required under said regulations to forward to the Bureau of Internal Revenue at the close of each month a sworn statement, on a certain prescribed form, known as Form 702, containing daily entries of business transacted during the month. Plaintiff conducted and maintained a bonded wine room which comes within the meaning of the term "bonded premises." During the months of October, November, and December, 1919, as the result of an investigation by the Commissioner of Internal Revenue, it was shown that forty-one sales of wines had not been delivered to the parties named in the monthly reports, but had been diverted to an illegal use. The punishment for such violation under the act of 1916 was a fine of not exceeding $5,000, or imprisonment for not more than five years, or both. Prior to the date of the compromise the Commissioner of Internal Revenue had refused to issue to plaintiff a permit required by section 6, Title II, of the national prohibition act, 41 Stat. 305, which provides as follows:

"No permit shall be issued to any person who, within one year prior to the application therefor or issuance thereof, shall have violated * * * any law of the United States * * * regulating traffic in liquor."

This was the situation when the compromise in question was effected. The revenue act of 1916, 39 Stat. 756, was repealed by the act of 1918, 40 Stat. 1057. It is true that the offenses charged against plaintiff were committed after the repeal of the act of 1916; and it is plaintiff's contention that inasmuch as the acts of which complaints were made were committed after the repeal of the act of 1916 there was no basis for a compromise, and no consideration for the payment of the $50,000. It appears, however, that the act of 1918 provides the same penalty for the offenses with which

plaintiff was charged as that provided in the act of 1916. Subdivision (f) of section 402 of the act of 1916 reads as follows:

"That any person who shall evade or attempt to evade the tax imposed by this section, or any requirement of this section or regulation issued pursuant thereof, * * * shall, on conviction, be punished for each such offense by a fine of not exceeding $5,000, or imprisonment for not more than five years or both, * * *."

Section 620 of the revenue act of 1918 provides—

"that whoever evades or attempts to evade any tax imposed by sections 611 to 615, both inclusive, or any requirement of sections 610 to 621, both inclusive, or regulation issued pursuant thereto, * * * shall, on conviction, be punished for each such offense by a fine of not exceeding $5,000, or imprisonment for not more than 5 years, or both, * * *."

The provisions contained in Regulations 28, supplement 2, promulgated under the act of 1916, were continued in effect under the act of 1918, by Treasury Decisions, 2788 and 2940, dated February 6, 1919, and October 29, 1919, respectively. Proprietors of bonded warehouses under the 1918 act, and the regulations thereunder, as under the act of 1916, and the regulations under same, were required to make a monthly report to the Internal Revenue Bureau showing the daily record of the business transacted. It was necessary to show the date of each shipment of wine, the name and address of each consignee, the number and date of his permit, the quantity and alcoholic content of the wines, and the serial number of the packages contained in the shipment. Charges of making false entries in its records, carried into its sworn monthly statements, constituted the foundation of the compromise. It should be noted that plaintiff energetically urged the settlement of its difficulties by a compromise of the penalties. Its permit to conduct its business had been denied, and while these charges existed a permit could not issue under the law. It was liable, under the law, for a total fine of $205,000, or imprisonment of not exceeding five years, or both, in each case. Its very existence was at stake. There was no denial of the charges. With

the payment of the agreed amount, $50,000, and acceptance of same by the Government, plaintiff's permit was at once issued, and it was agreed that no criminal prosecution would be instituted; it was a closed transaction. Plaintiff received the full benefits resulting from the compromise, which it has ever since enjoyed, and now it is seeking to recover said sum from the Government on the sole ground that in the correspondence and negotiations concerning the charges against plaintiff, and the compromise of same, both plaintiff and the Government inadvertently made references to a statute, and to certain departmental regulations, which at the time of the commission of the offenses under discussion had been repealed, although superseded by another statute and other regulations in force and effect at the time the offenses were committed, containing the same provisions, and providing precisely the same punishment as the prior act.

The only question at issue between plaintiff and the Government at the time of the negotiations for a compromise was the amount which plaintiff should be required to pay in settlement of admitted violations of law. Neither party was concerned in the least with the incidental references occurring in the correspondence. Such references were in no real sense material. The facts were fully known and the charges were undenied. The payment was voluntarily made pursuant to an agreement authorized by section 3229 of the Revised Statutes providing for the compromise of any civil or criminal case arising under the internal-revenue laws, which statute was specifically invoked by plaintiff itself in urging upon the Commissioner of Internal Revenue his authority to accept a payment in compromise.

It is the opinion of the court that plaintiff is not entitled to recover back the money paid, and it is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

FRED C. BLENKNER v. THE UNITED STATES

[No. F-180. Decided February 20, 1928]

On Demurrer to Amended Petition

Jurisdiction; petition in nature of bill of discovery.—Where plaintiff alleges that he has "no information or knowledge upon which to base an allegation" as to Government orders or contracts for the manufacture of ordnance involving the use of his patents, the petition in effect seeks a right of discovery, which the Court of Claims is without power to grant.

Same; Dent Act; suit to recover excess over agreed royalties.—A suit to recover royalties in excess of those agreed upon in a license contract permitting the Government to manufacture, use, or sell a patented article can not be maintained in the Court of Claims under the Dent Act.

The Reporter's statement of the case:

Mr. H. C. Workman, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.
Mr. Louis B. Montfort, opposed.

The averments of the amended petition are reviewed in the opinion.

BOOTH, *Judge*, delivered the opinion of the court:

Defendant demurs to plaintiff's petition. Heretofore a rule had issued from the court requiring plaintiff to make the petition more definite and certain. Therefore the petition now under review is plaintiff's amended one. Defendant still insists upon its demurrer. The material allegations of the petition disclose the plaintiff as copatentee with one John Y. Bassell of devices known as gun sights, adaptable for use on any caliber or model of cannon, machine gun, or firearm. Two patents for the device were issued to the patentees, one No. 870337, dated November 5, 1907, the other No. 919525, dated April 27, 1909. On January 16, 1911, the patentees entered into a written contract with the War Department, licensing the latter to manufacture, cause to be manufactured, use, or sell the patents for and during the

term of the patent rights. The consideration for this contract was the payment of $5,000 in cash and royalties at the rate of 15 cents for each gun sight coming within the contract. The $5,000 was duly paid. On September 5, 1917, the patents having been duly assigned by Bassell to the plaintiff on February 14, 1917, the plaintiff in his own right filed a claim with the War Department for royalties under the contract, asserting an infringement of the patents by certain manufacturers. The War Department allowed the claim to the extent of 85,169 gun sights. The auditor for the department disallowed the settlement, but the Comptroller General, on February 8, 1922, overruled the auditor, and the plaintiff finally received and accepted $12,959.95 in payment thereof. On January 11, 1923, the year following the disposition of the above claim, the plaintiff alleged that he for the first time became aware of a letter, dated April 12, 1917, written by the Chief of Ordnance, and addressed to the Colts Patent Fire Arms Manufacturing Company. Paragraph 4 of the letter is relied upon to sustain this claim, and we quote it in full:

"4. As previously decided, the rear sight must be of the type as now shown on the Benet-Mercier machine rifle, differing in details as given on the prints which have already been supplied you. The rear cover was redesigned to eliminate the top rib in accordance with your suggestion, and prints have been forwarded to the commanding officer Springfield Armory; it is presumed that these have since been received at your establishment."

Plaintiff's suit is predicated upon the above paragraph of the letter, and the allegation is made that the rear sights on the Benet-Mercier machine rifle referred to in the letter infringe plaintiff's patents, and that he has not been compensated for their use. Aside from this specific charge is a general and decidedly indefinite allegation that between June 30, 1911, and the filing of the petition the plaintiff is advised and "verily believes" that his patents have been infringed by numerous other manufacturers of firearms, which he names, in manufacturing ordnance under contracts for the Government. Plaintiff sought a reopening of his claim before the Comptroller General and was refused. He pro-

ceeded again before the War Department for additional compensation without avail. He finally asked the War Department to assemble the pertinent data relative to his contention, including the letter of April 12, 1917, and submit the same to the Comptroller General for decision. On December 18, 1925, the Comptroller General decided adversely to plaintiff's contention, and hence this suit. The petition concludes with a prayer for judgment based upon an alleged failure to pay for 114,641 gun sights, at the rate of 70 cents per sight, less the sum of $12,595.95, heretofore paid, i. e., $67,652.75. The contention for increased royalties over the amount fixed in the license contract is claimed under the act of March 2, 1919, 40 Stat. 1272–1273, commonly known as the Dent Act. It is unnecessary to discuss this argument. Obviously the case can by no possibility become a Dent Act case. *United States Bedding Co.* v. *United States*, 55 C. Cls. 459.

If we correctly apprehend plaintiff's allegations, he now seeks recovery, irrespective of the license contract, upon the theory that he is entitled to just compensation for the gun sights manufactured by or for the Government until the expiration of his patent rights. Clearly the contention is untenable; at any rate the plaintiff has filed no brief to sustain it and contented himself with a mere statement of facts in oral argument. Whatever claim the plaintiff may have grows out of the license agreement; and aside from the various arguments advanced by the defendant to sustain the demurrer it is apparent from the face of the petition that the court is without adequate information to allow the case to go to proof. Plaintiff's allegations abound in conjecture and inference, no positive statement of fact material to the issue discloses a liability or sets forth a cause of action. One paragraph of a letter passing between an official of a department and a Government contractor with reference to the manufacture of rifles is wholly insufficient to sustain the manufacture of the rifles mentioned, and in nowise discloses the detail of construction or what was or what was not used. The court would not be warranted in assuming the existence of facts which the plaintiff himself is unable to state with positiveness or certainty. We are not advised as to plain-

tiff's patent beyond the general term "gun sights." No letters patent are attached to the petition and nothing appears of record except a vague and indefinite allegation that possibly upon proof the allegations may be sustained. Plaintiff admits and alleges that he has "no information or knowledge upon which to base an allegation" as to Government orders or contracts for the manufacture of ordnance involving the use of his patents.

What, as a matter of fact, the petition seeks is the right of discovery. This we have no power to grant. While this is not a patent case in the usual acceptation of the term, it involves the issue of infringement, and would unquestionably require a volume of proof to sustain or discredit it in the absence of more precise statements of fact and absolute knowledge of the existence of things pertinent to the issue. We believe the demurrer should be sustained and the petition dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

FRANK H. STEWART ELECTRIC CO. v. THE UNITED STATES

[No. F-299. Decided February 20, 1928]

On the Proofs

Income and excess-profits taxes; good will as invested capital; "payment bona fide therefor specifically as such."—On a finding by the court that plaintiff, upon its organization, issued no stock for good will as such, which it seeks to have included in invested capital for the purpose of determining its income and excess-profits taxes for the years 1917–1920, petition for a refund of taxes computed on such a basis is dismissed.

The Reporter's statement of the case:

Mr. K. N. Parkinson for the plaintiff. *Mr. George C. Ober, jr.*, was on the brief.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, the Frank H. Stewart Electric Company, is a corporation organized and existing under the corporation law of 1874 of the State of Pennsylvania, with its principal place of business at 35–39 North Seventh Street, Philadelphia, and has been located there since its formation in 1904.

II. Plaintiff is engaged in the wholesale and retail electrical supply business and has been continuously so engaged since its formation. It was incorporated to and did succeed the wholesale electrical supply business which had been conducted by Frank H. Stewart as an individual, at the same address, continuously from 1894 to 1904.

III. Frank H. Stewart, the predecessor of the plaintiff corporation, during the ten years in which he had been engaged in business prior to the incorporation of the plaintiff herein, had acquired good will which was valuable.

IV. In 1904 Frank H. Stewart, then in business as aforesaid, contemplating the organization of a corporation to take over the same, consulted an attorney with reference to his right to receive capital stock of the proposed corporation in return for the good will of his business. The attorney advised him that the Pennsylvania statutes did not specifically set forth that stock could be issued for good will and that if it were attempted the application for the charter might be held up. The attorney also advised him that he could transfer certain letters patent which he owned, being Letters Patent No. 627215, for handles and adjusters for electric lights; No. 656431, for cord adjusters for electric lights; and No. 39786, being a trade-mark for an electric-light support, for 500 shares of the capital stock of the corporation. The articles of incorporation provided for 1,000 shares of the par value of $100 each, of which 500 shares were common stock and 500 shares preferred stock. Four hundred shares of the preferred stock were to be issued to Frank H. Stewart, "trading as Frank H. Stewart & Company," for the stock of electrical supplies, furniture and fixtures, and book accounts then belonging to said Frank H. Stewart, and the articles further provided that 500 shares of the common

stock subscribed for by Frank H. Stewart "are to be issued to Frank H. Stewart as full-paid capital stock not liable to any further calls or assessments in consideration of the assignment and conveyance by said Frank H. Stewart to this corporation at the price and consideration of $50,000" of the letters patent and trade-mark above mentioned. These patents and trade-mark were duly transferred to the corporation at the value of $50,000, which was credited to Frank H. Stewart, and his account was debited with the 500 shares of common stock. No stock was issued for good will as such. Several years after the transfer of the patents to the corporation, and about 1907, a resolution was adopted by the board of directors ordering that the patents of the company carried on its books be thereafter inventoried as worthless, owing to the action of the board of underwriters in condemning their use. Capital stock could have been issued in return for good will transferred to a corporation.

V. Plaintiff filed income-tax returns for the years 1917 to 1920, both inclusive. The correctness of the amount of said taxes was disputed by the Commissioner of Internal Revenue and a final recomputation of the tax was made by the commissioner, and the tax as shown by this final recomputation was paid by plaintiff.

VI. Plaintiff made claim for refund as required by law and the same was denied by the Commissioner of Internal Revenue.

VII. If the allowance for good will as claimed by plaintiff herein is made the plaintiff is entitled to a judgment of $6,168.11.

The court decided that plaintiff was not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This is a suit for refund of income and excess-profits taxes for the years 1917 to 1920, inclusive. Having paid the taxes, application for refund was made by plaintiff and overruled by the Commissioner of Internal Revenue. The claim is (1) that Frank H. Stewart, predecessor of the plaintiff corporation, had developed a good will of large

value; (2) that plaintiff acquired the good will so developed by Mr. Stewart and issued $50,000 of its capital stock at par for such good will, and is therefore entitled to have that amount included in its "invested capital," as provided in the acts in question, and (3) that the good will was acquired for stock issued "*bona fide* and specifically therefor." The defense does not question the fact that Mr. Stewart, who was a pioneer wholesale dealer in electrical supplies, had been engaged in that business for many years in Philadelphia and enjoyed a reputation for business integrity as well as for the quality of products handled, and that accordingly there was a valuable good will of that business, but it does deny that good will passed to the corporation within the meaning of the taxing acts, or that the corporation made payment "*bona fide* therefor specifically as such" in money or in its capital stock. The principal question, therefore, is whether the corporation issued capital stock to the amount of 500 shares or less for the good will of the business of the predecessor so as to justify its inclusion as part of invested capital within the meaning of the applicable statutes. Section 207 of the war revenue act of 1917, 40 Stat. 306, section 326 of the revenue act of 1918, 40 Stat. 1092. For the purposes of the case it is only necessary to refer to the act of 1917, section 207 of which, defining invested capital, provides that "(3) (b) the good will, trademarks, trade brands, the franchise of a corporation or partnership, or other intangible property shall be included as invested capital if the corporation * * * made payment *bona fide* therefor specifically as such in cash or tangible property, the value of such good will, trade-mark, trade brand, franchise, or intangible property not to exceed the actual cash or actual cash value of the tangible property paid therefor at the time of such payment; but good will * * * *bona fide* purchased, prior to March third, nineteen hundred and seventeen * * * for and with shares in the capital stock of a corporation (issued prior to March third, nineteen hundred and seventeen), in an amount not to exceed, on March third, nineteen hundred and seventeen, twenty per cent of the total * * * shares of the capital

stock of the corporation, shall be included in invested capital at a value not to exceed the actual cash value at the time of such purchase, and in case of issue of stock therefor not to exceed the par value of stock par." The act of 1918 restricts the value of intangibles to be included in invested capital to 25 per cent of the total shares instead of 20 per cent as in the act of 1917. The plaintiff corporation was incorporated in 1904. While it was in process of organization Mr. Stewart inquired of his attorney whether he could subscribe for or receive capital stock of the corporation in return for the good will of the business which he regarded as valuable, and it was valuable. He was advised that under the Pennsylvania statute he could not thus pay for capital stock, and further that an attempt to do so might result in delay in effecting the intended incorporation. At the same time Mr. Stewart was advised by his attorney that he could pay for the amount of stock that he contemplated receiving as the value of good will by transferring to the corporation two designated patents and a trade-mark then owned by him. This latter course was adopted. The patents and the trade-mark were duly transferred to the corporation, and in return therefor 500 shares of stock were issued to Mr. Stewart. No stock was issued for good will as such. The corporation's books showed the account of Mr. Stewart as credited with the patents and trade-mark at the value stated and as debited with the corresponding amount of stock. The good will which the statute authorizes to be included in invested capital is that for which payment has been made *bona fide*, "specifically as such," or good will *bona fide* purchased prior to named dates. The reasons for requiring such items as good will, trade-mark, trade brands, or franchises to be paid for specifically as such in estimating invested capital are obvious. The shares of stock were issued for patents. None were issued for good will as such. If Mr. Stewart had sold his holding in the corporation or had opened a store in his individual name in the same neighborhood it is clear that the corporation could not have complained that the good will of his individual business had been paid for in stock. The burden is upon

the plaintiff to show that the stock was issued for good will, and it has failed to make the necessary proof. The petition should be dismissed. And it is so ordered.

Moss, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

CHARLES M. CURRAN v. THE UNITED STATES

[No. E-590. Decided February 20, 1928]

On the Proofs

Personal property of Army officer lost in storage; act of March 4, 1921; finding of Secretary of War.—Personal property of an Army officer, stored by him with the quartermaster while he was engaged in overseas duty, and lost in storage, is not property for the loss of which he is entitled to be reimbursed under the act of March 4, 1921, and a finding by the Secretary of War to the contrary is not conclusive upon the court.

The Reporter's statement of the case:

Messrs. Cornelius H. Bull and *George A. King* for the plaintiff. *King & King* were on the brief.

Mr. J. J. Lenihan, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Frank J. Keating* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, Charles M. Curran, was a major in the Quartermaster Corps, United States Army, and on active duty from May 1, 1917, to October 11, 1920.

II. In July, 1919, the plaintiff received orders for overseas duty. He was unable to take his household goods overseas with him and turned them over to the quartermaster at Washington, D. C., for packing and storing until his return. He returned to the United States in July, 1920, and while at Atlanta, Georgia, directed the quartermaster at Washington, D. C., to ship him said personal household goods. Upon receipt of the property at Atlanta, Georgia, one box containing part of the personal effects of plaintiff was missing, has never been found, and was lost while said property was in storage.

III. Plaintiff submitted a claim to the War Department for reimbursement of the value of said lost personal effects, and a board of Army officers was convened under the provisions of Finance Office Memorandum No. 57 to examine into and determine the facts relative to the loss of plaintiff's property. Said board convened on February 3, 1923, examined into the claim of plaintiff, and made the following findings:

"That in July, 1919, Major Curran received orders for overseas duty. As he was unable to take his household goods overseas with him, he turned same over to the quartermaster at Washington, D. C., for packing and storing until his return. In July, 1920, Major Curran had his property shipped to him at Atlanta, Ga. Upon receipt of the property one box was missing and could not be located. Records show that this box was lost while property was in storage.

"The board finds that the circumstances of this loss come within the intent and meaning of the phrase 'or, while at the time of such loss, claimant was engaged in authorized military duties in connection therewith.'

"Each and every item was the private property of the claimant; its loss was without fault or negligence of the claimant and within the meaning of par. 2, sec. 1, act of March 4, 1921.

"The property was required to be possessed and used by claimant pursuant to War Department tables of equipment and articles of reasonable necessity, and the articles of personal property were reasonable, useful, necessary, and proper for claimant while in quarters engaged in the public service in the line of duty, except where otherwise noted and of the value as follows:

*   *   *   *   *

"None of the items should be replaced in kind from Government property on hand for the reason that same have already been replaced from private funds, and we hereby fix the total value at $239.95, which sum should be paid claimant in full settlement, release, and discharge."

IV. The findings and recommendations of the board of officers were transmitted to the Secretary of War for his action, and he certified under date of October 20, 1923, that—

"The articles of property, in the items and values as found by the board, were reasonable, useful, necessary, and

Opinion of the Court

proper for those claimants in the public service in line of duty, in quarters, or in the field; that the losses occurred under the circumstances ascertained and determined by the board and that none of the items should be replaced in kind from Government property on hand. The values are hereby, under the provisions of the act of Congress of March 4, 1921, respectively ascertained and determined in the amounts set opposite the names of claimants above, and the schedule is approved for a total of $3,080.48, which amount shall be paid by a disbursing officer of the Army and be in full settlement, release, and discharge. H. R. Wilson, major, Finance Department, office of Chief of Finance, is authorized to indorse approval on claims above listed."

The said sum of $3,080.48 represented a number of similar claims of which plaintiff's claim was one.

V. The findings and recommendations and certifications of the Secretary of War were submitted to a finance officer of the United States stationed in Washington, D. C., for payment of the claim, who, September 24, 1925, formally notified plaintiff to the effect that the Judge Advocate General and the Secretary of War had not as yet deemed it advisable to proceed further on claims for lost property, and, further, that the finance officer could not pay the claim of plaintiff in view of the interpretation of the act of March 4, 1921 (41 Stat. 1436), by the Comptroller General of the United States.

VI. The plaintiff has received no sum from the United States on account of loss of personal property hereinbefore set forth.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

In July, 1919, plaintiff, Charles M. Curran, officer of the Army, being ordered for overseas military duty, delivered his household goods to the quartermaster at Washington, D. C., for packing and storing until his return. After his return plaintiff requested that said household goods be sent to him at Atlanta, Ga., and upon receiving same it was discovered that one box containing a portion of his household goods was missing. Plaintiff submitted a claim for reimbursement for his lost goods, and same was considered by a

duly authorized board of Army officers, which board made the following report:

"That in July, 1919, Major Curran received orders for overseas duty. As he was unable to take his household goods overseas with him, he turned same over to the quartermaster at Washington, D. C., for packing and storing until his return. In July, 1920, Major Curran had his property shipped to him at Atlanta, Ga. Upon receipt of the property one box was missing and could not be located. Records show that this box was lost while property was in storage.

"The board finds that the circumstances of this loss come within the intent and meaning of the phrase 'or, while at the time of such loss, claimant was engaged in authorized military duties in connection therewith.'

"Each and every item was the private property of the claimant; its loss was without fault or negligence of the claimant and within the meaning of paragraph 2, section 1, act of March 4, 1921.

"The property was required to be possessed and used by claimant pursuant to War Department tables of equipment and articles of reasonable necessity, and the articles of personal property were reasonable, useful, necessary, and proper for claimant while in quarters engaged in the public service in the line of duty, except where otherwise noted and of the value as follows:

* * * * *

"None of the items should be replaced in kind from Government property on hand for the reason that same have already been replaced from private funds, and we hereby fix the total value at $239.95, which sum should be paid claimant in full settlement, release, and discharge."

Whereupon the Secretary of War issued a certificate which was in the following language:

"The articles of property, in the items and values as found by the board, were reasonable, useful, necessary, and proper for those claimants in the public service in line of duty, in quarters or in the field; that the losses occurred under the circumstances ascertained and determined by the board and that none of the items should be replaced in kind from Government property on hand. The values are hereby under the provisions of the act of Congress of March 4, 1921, respectively ascertained and determined in the amounts set opposite the names of claimants above, and the schedule is approved for a total of $3,080.48, which amount shall be paid by a disbursing officer of the Army and be in full settlement,

release, and discharge. H. R. Wilson, major, Finance Department, office of Chief of Finance, is authorized to indorse approval on claims above listed."

The said sum of $3,080.48 represented a number of similar claims of which plaintiff's claim was one.

Plaintiff, however, was notified by the proper Government official that the Judge Advocate General and the Secretary of War had not deemed it advisable to proceed further on claims for lost property, and, further, that he could not pay said claim in view of the interpretation by the Comptroller General of the act of March 4, 1921. Plaintiff is suing to recover the amount certified by the Secretary of War.

The defendant contends that this court is without jurisdiction in the present case under the decision of the United States Supreme Court in the *Babcock case*, 250 U. S. 328. The decision in the *Babcock case* is not applicable. Plaintiff claims that this is an action on an award by the Secretary of War. This court has jurisdiction in such an action. See *United States* v. *Kaufman*, 96 U. S. 567.

The act of March 4, 1921, 41 Stat. 1436, is an act to provide for the settlement of the claims of officers, enlisted men, and members of the Nurse Corps of the Army for reimbursement for the loss of private property, the pertinent portions of which read as follows:

"SECTION 1. That private property belonging to officers, enlisted men, and members of the Nurse Corps (female) of the Army, including all prescribed articles of equipment and clothing which they are required by law or regulation to own and use in the performance of their duties, and horses and equipment required by law or regulations to be provided by mounted officers, which since the 5th day of April, 1917, has been or shall hereafter be lost, damaged, or destroyed in the military service, shall be replaced, or the damage thereto, or its value recouped to the owner as hereinafter provided, when such loss, damage, or destruction has occurred or shall hereafter occur without fault or negligence on the part of the owner in any of the following circumstances:

* * * * *

"Second. When it appears that such private property was so lost, damaged, or destroyed in consequence of its owner having given his attention to the saving of human life or property belonging to the United States which was in danger

at the same time and under similar circumstances, or while, at the time of such loss, damage, or destruction, the claimant was engaged in authorized military duties in connection therewith.

* * * * *

"SEC. 2. That except as to such property as by law or regulation is required to be possessed and used by officers, enlisted men, and members of the Army Nurse Corps (female), respectively, the liability of the Government under this act shall be limited to damage to or loss of such sums of money or such articles of personal property as the Secretary of War shall decide or declare to be reasonable, useful, necessary, and proper for officers, enlisted men, or members of the Army Nurse Corps (female), respectively, as the case may be, to have in their possession while in quarters, or in the field, engaged in the public service in the line of duty.

"SEC. 3. That the Secretary of War is authorized and directed to examine into, ascertain, and determine the value of such property lost, destroyed, captured, or abandoned as specified in the foregoing paragraphs, or the amount of damage thereto, as the case may be; and the amount of such value or damage so ascertained and determined shall be paid by the disbursing officers of the Army, or such property lost, destroyed, captured, or abandoned, or so damaged as to be unfit for service, may be replaced in kind from Government property on hand when the Secretary of War shall so direct.

"SEC. 4. That the tender of replacement or of commutation or the determination made by the Secretary of War upon a claim presented, as provided for in the foregoing section, shall constitute a final determination of any claim cognizable under this chapter, and such claim shall not thereafter be reopened or considered."

Personal property, the loss for which recovery may be had, must therefore come within the general description "all prescribed articles of equipment and clothing which they are required by law or regulations to *own* and *use*, in the performance of their duties," or to such articles of personal property as the Secretary of War may declare to be "reasonable, useful, necessary, and proper for officers to have in *their possession* while in quarters or in the field engaged in the public service in the line of duty." It will be noticed that the Secretary of War certified in this case that "the articles of property, in the items and values as found by the board were reasonable, useful, necessary, and proper

for those claimants in the public service in line of duty, in quarters or in the field, that the losses occurred under the circumstances ascertained and determined by the board * * *." The certificate of the Secretary of War, in omitting the qualifying phrase "*to have in their possession*," did not operate to bring the property with which the Secretary was attempting to deal, within the terms of the statute. It is clear that it does not come within the description "all prescribed articles of *equipment* and *clothing* which they are required by law or regulation to *own and use*, in the performance of their duties." The provision of the statute under which plaintiff claims the right of reimbursement is found in the second paragraph of section 1 of the act, which reads as follows: "When it appears that such private property was so lost * * * while at the time of such loss, * * * claimant was engaged in authorized military duties in connection therewith." It must be borne in mind that there is no express provision for reimbursement for the loss of private property of any character or description while in storage. The Secretary of War approving the action of the board found that the property was lost in storage, and decided as a conclusion of law "that the circumstances of this loss come within the intent and meaning of the phrase 'or, while at the time of such loss claimant was engaged in authorized military duties in connection therewith.'" The determination by the Secretary of War of a claim presented under the act of 1921 is final and conclusive only when such determination is authoritatively made. The court has before it precisely the same facts upon which the Secretary of War based his conclusion of law, and under those facts the court is of the opinion that in construing the statute to cover the loss in question the conclusion of the Secretary of War was clearly erroneous. The property lost was household furnishings, an itemized list of which is contained in the record. For reasons hereinabove set forth the articles of property do not come within the meaning of the provisions of the statute which purport to define the class or character of property for the loss of which payment may be had. And further, the language, "when it appears that such private property was so lost

* * * while at the time of such loss, * * * the claimant was engaged in authorized military duties in connection therewith," can by no logical process be held to apply to property lost in storage under the facts of this case. Applying the ordinary rules of construction of language the phrase, " while at the time of such loss the claimant was engaged in authorized military duties *in connection therewith*," means in connection with the private property so lost. It is not susceptible of any other reasonable interpretation.

If the court should hold that the contention of plaintiff in this case is correct, it would result in committing the Government to the principle of insurance against the loss of private property stored without charge in a Government warehouse and lost by the negligence of the Government's agent in charge of such property, which was never the intention of Congress.

It is the opinion of the court that plaintiff is not entitled to recover.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

JOHN M. FLYNN v. THE UNITED STATES

[No. H–186. Decided February 20, 1928]

On Demurrer to Petition

Jurisdiction; waiver of tort; suit in assumpsit; implied promise to pay damages.—The Court of Claims does not have jurisdiction of a case sounding in tort, nor can the plaintiff, for the purpose of establishing jurisdiction, waive the tort and sue in assumpsit upon an implied promise to pay damages therefor.

The Reporter's statement of the case:

Mr. W. F. Norris, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Johnson & Pefferle, opposed.

The material allegations of the petition are stated in the opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The petition alleges facts showing that plaintiff, employed as an elevator man in a Federal building and while in the performance of his duties, suffered personal injuries which have entailed financial losses and expense, for which he sues. The alleged cause of these injuries is the breaking of the handle of a heavy oil can which he was lifting that caused the can to be precipitated upon his toes, with the result that the toe had to be amputated and ultimately, because of complications alleged to have been set in motion by the injury, he suffered the amputation of both legs. The petition is demurred to.

Plainly the alleged cause of action is one sounding in tort. In the *Bigby case*, 188 U. S. 400, the injuries arose from the fall of an elevator belonging to the Government and operated by one of its employees. The court considered the provision in section 145, Judicial Code, excluding from judicial cognizance any claim against the United States for damages in cases "sounding in tort," and also the plaintiff's contention that even though the case sounded in tort, he could waive the tort and sue in assumpsit, upon an implied contract whereby the Government agreed to carry him safely in its elevator and use due care in the operation of it. This theory was rejected and it was held (p. 407) that the court has steadily adhered to the general rule that without its consent given in some act of Congress the Government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employees; that there is no reason to suppose that Congress has intended to change or modify that rule, and, on the contrary, such liability to suit is expressly excluded by the Tucker Act (Sec. 145, Judicial Code). Quoting with approval from the case of *Cooper* v. *Cooper*, 147 Mass. 370, 373, it is said: "A right of action in contract can not be created by waiving a tort and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained." The conclusion reached in the *Bigby case*, *supra*, must be the conclusion reached here, that it is for Congress to determine in all such cases what justice requires upon the part of the

Government. If any exceptions ought to be made to the general rule it is for Congress to make them. It may be added that some provision has been made for injured employees of the United States by the act of September 7, 1916, 39 Stat. 742, U. S. C. Sec. 751, but it does not confer power on this court.

The demurrer should be sustained and the petition dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

THOMAS L. MORROW v. THE UNITED STATES

[No. F-328. Decided February 20, 1928]

On the Proofs

Reimbursement of medical expenses, Navy; sec. 1586, R. S.; cancellation of leave during illness; restoration to duty status.—The plaintiff, an officer in the Medical Corps of the Navy, while on duty became ill, upon application was given leave of absence and repaired to his home. While there he was placed in a civilian hospital and his leave immediately canceled. *Held*, that cancellation of leave under circumstances which prevented the resumption of military duties, did not constitute a restoration to duty status, and the expenses of medical attention at the hospital not being incurred when he was on duty, sec. 1586, Revised Statutes, prohibits their reimbursement.

The Reporter's statement of the case:

Mr. Cornelius H. Bull for the plaintiff. *Mr. George A. King* and *King & King* were on the brief.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Frank J. Keating* was on the brief.

The court made special findings of fact, as follows:

I. At all the times hereinafter mentioned plaintiff was a lieutenant of the Medical Corps in the United States Navy.

II. While on duty at the naval hospital, Norfolk, Va., plaintiff became ill on April 8, 1925, and was confined to his quarters under medical attention until April 24, 1925, when

he requested and obtained of his commanding officer, Capt. Charles M. DeValin, an order for six days' leave of absence, commencing April 27, 1925, to enable him to visit his home at Mebane, N. C., to recuperate. Plaintiff left the Norfolk Navy Yard immediately, and after a twelve-hour journey reached his home, where on April 30, 1925, he became unconscious.

III. Dr. William R. Stanford, a civilian physician, was immediately called upon to attend him, and after a diagnosis of his condition recommended that he be taken at once to Watts Hospital at Durham, N. C., for prompt medical treatment. On April 30, 1925, plaintiff was taken by Doctor Stanford by automobile to Watts Hospital and entered therein as a patient. Watts Hospital was a civilian institution not connected in any way with the United States Government.

IV. Upon hearing that he was to be placed in a civilian hospital, plaintiff requested that his aforesaid commanding officer at Norfolk, Capt. Charles M. DeValin, be notified by telephone. On April 30, 1925, Doctor Stanford communicated with Commander Sellers, the executive officer of Captain DeValin at Norfolk, Va., by telephone and notified him of the critical physical condition of the plaintiff and what had been done for him. Commander Sellers at once informed Captain DeValin that plaintiff was seriously ill and had been removed from his home to Watts Hospital. Captain DeValin immediately canceled plaintiff's leave of absence and directed that he be given every proper care and attention at Watts Hospital until a Navy medical officer could be sent to care for him. The superintendent at Watts Hospital was on April 30, 1925, notified by Commander Sellers that plaintiff's leave orders had been revoked and was instructed to care for him until he could be removed to Norfolk.

V. On May 1, 1925, the Bureau of Navigation ordered the commandant of the fifth naval district to direct a medical officer and an attendant to proceed to Durham, N. C., to care for plaintiff and bring him to the naval hospital at Norfolk, Va. On May 3, 1925, Lieutenant Sabiston, of the

Medical Corps, arrived at Durham for this purpose. On May 5, 1925, the Bureau of Navigation by dispatch canceled the remainder of leave granted plaintiff by the commandant of the fifth naval district and ordered plaintiff to continue treatment at Watts Hospital until able to travel to the naval hospital at Norfolk, Va.

VI. Plaintiff remained under medical treatment at Watts Hospital at Durham, N. C., from April 30 to May 8, 1925. On this date he was sufficiently recovered to permit his safe removal to the naval hospital at Norfolk, Va. He was accordingly admitted to said naval hospital at Norfolk, Va., on May 8, 1925.

VII. The nearest medical supplies to which plaintiff might have had recourse were at Norfolk, Va. There was no naval medical officer in the vicinity of plaintiff's home or at Durham, N. C., who could have attended him and it became necessary to employ civilian physicians and nurses to attend him.

VIII. During the period April 30, 1925, to May 8, 1925, while at Watts Hospital, Durham, N. C., plaintiff incurred expenses for civilian medical attention amounting to $610.55. For said expenses plaintiff has not been reimbursed by the United States.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, Thomas L. Morrow, while on duty as a lieutenant, United States Navy, in the United States Pharmacists Mates' School, which was connected with the Norfolk Naval Hospital, became seriously ill on April 8, 1925, and from that date until April 27, 1925, was confined to his quarters under the care and treatment of naval medical officers attached to the hospital. On his own application plaintiff was granted a leave of absence for six days, commencing April 27, 1925. He proceeded at once to his home at Mebane, N. C. His condition becoming worse he was removed to a civilian hospital at Durham, N. C., on April 30, 1925, where he remained until May 8, 1925. This action is for the recovery of the amount expended by plaintiff for hospi-

tal and medical treatment at that institution. If plaintiff is entitled to recover he should receive $610.55.

On April 30, 1925, immediately upon plaintiff's arrival at the hospital at Durham the commanding officer at Norfolk canceled the remainder of plaintiff's leave of absence. It is the contention of plaintiff that the cancellation of the leave of absence automatically restored his duty status and brings his claim within the operation of section 1586, Revised Statutes, which reads as follows:

> "Expenses incurred by any officer of the Navy for medicines and medical attendance shall not be allowed unless they were incurred when he was on duty, and the medicines could not have been obtained from naval supplies, or the attendance of a naval medical officer could not have been had."

The court is unable to agree with plaintiff's theory. In order to be entitled to reimbursement in this case it must be shown that plaintiff was in a duty status. On and after April 27, 1925, when plaintiff left the Norfolk Naval Hospital he was on leave of absence, and was actually absent from his station or post of duty. The mere cancellation of the leave of absence on April 30, 1925, could not reasonably be construed as restoring the duty status. The language of the statute is plain and free from ambiguity. Its purpose and intention are equally clear. The Government maintains well-equipped hospitals at posts and stations, with medical supplies, and a corps of efficient and capable medical officers. An officer, or other member of the service, in the Army or Navy, when on duty at such posts or stations, is entitled to medicines and to medical treatment free of charge. If on detached duty at a place where such medicines and treatment were not available he might be reimbursed for necessary expenditures for such service. In no circumstances is he entitled under the law to reimbursement unless such expenses were incurred when he was on duty. To have ordered plaintiff to his post of duty at the Norfolk Naval Hospital at the time of the cancellation of the leave of absence would have been a vain thing. He was a desperately sick man, completely incapable of performing any service whatever, and had been in that condition since April 8, 1925. Conscious of the imminent need for medicines and medical treatment,

and chargeable with a knowledge of the law and regulations affecting his rights in the premises, he voluntarily removed himself from a naval hospital where every reasonable facility for his treatment obtained, and went to his home at Mebane, N. C., beyond the reach of the medical officers and the medicinal supplies of the Navy. Plaintiff's claim does not come within the meaning and intent of the statute, and he is not entitled to recover, and it is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

RODMAN CHEMICAL COMPANY v. THE UNITED STATES[1]

[No. H-280. Decided February 20, 1928]

On Demurrer to Amended Petition

Patents; secrecy order, act of October 6, 1917; infringement suit, act of June 25, 1910, as amended by act of July 1, 1918; infringement before grant of patent; statute of limitations.—The right given by the act of October 6, 1917, to sue for compensation for the use by the Government of an invention, is dependent upon the issuance by the Commissioner of Patents of a secrecy order, and where no such order has been issued, suit under this act can not be maintained, nor does jurisdiction attach under the act of June 25, 1910, as amended by the act of July 1, 1918, where the alleged infringing use occurs before the patent was granted or more than six years prior to institution of suit.

The Reporter's statement of the case:

Mr. Charles F. Kincheloe, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer. *Mr. Karl Fenning* was on the briefs.

Mr. Robert A. Littleton, opposed. *Mr. W. W. Spalding* and *Mason, Spalding & McAtee* were on the briefs.

The material averments of the amended petition are reviewed in the opinion.

[1] Certiorari denied.

Opinion of the Court

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The Rodman Chemical Company, assignee of Hugh Rodman, alleged inventor of "a new and useful improvement in methods of making activated carbon," sues to recover compensation for the use of the invention by the Government. The petition in one aspect predicates the right to sue upon the act of October 6, 1917, 40 Stat. 394, or, in the alternative, upon the act of June 25, 1910, as amended by the act of July 1, 1918, 40 Stat. 705.

The Government has interposed a demurrer, and upon the questions thus raised the case is before the court. The act of October 6, 1917, upon which plaintiff principally relies, is entitled "An act to prevent the publication of inventions by the grant of patents that might be detrimental to the public safety or convey useful information to the enemy, to stimulate invention, and provide adequate protection to owners of patents, and for other purposes," and provides:

"That whenever during a time when the United States is at war the publication of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war he may order that the invention be kept secret and withhold the grant of a patent until the termination of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the commissioner that in violation of said order said invention has been published or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents, or under a license of the Secretary of Commerce as provided by law.

"When an applicant whose patent is withheld as herein provided, and who faithfully obeys the order of the Commissioner of Patents above referred to, shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately received a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government."

Opinion of the Court

It is averred that the plaintiff and its assignor, Rodman, have complied with all of the provisions of this act; that they have kept the invention secret; have not published it, and have made no application for a patent for it in a foreign country, and that a tender of its use was duly made to the Government. The averments show (Paragraph IX) that Rodman developed his improvement in methods of making activated carbon on or about July 1, 1918, and at a conference with representatives of the Government held on July 26 and 27, 1918, he disclosed minutely to them his invention and notified them that an application for a patent was soon to be filed. The application was filed August 21, 1918, and a patent did not issue until July 6, 1926. It is not averred that the Commissioner of Patents ever made an order that the invention be kept secret and the question is whether, under this act of October 6, 1917, there can be a cause of action in the absence of such an order. This act is confined to a time when the United States is at war. Under stated conditions the Commissioner of Patents may order that the invention be kept secret and withhold the grant of a patent until the termination of the war. It was said in *Zeidler's case*, 61 C. Cls. 537, 553, that the commissioner was given discretion to enforce secrecy. This order may issue when in his opinion the granting of a patent might be detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war. The right of an applicant to sue is given where the patent is withheld, as provided in the act. There is no authority for suing under the act where the commissioner has not ordered that the invention be kept secret. The plaintiff's contention that the act is mandatory and not permissive (*Supervisors* v. *United States*, 4 Wall. 435, 447) can not be sustained when the whole act is considered, but if it could be sustained the situation would not be changed because the right to sue is based on his having issued the secrecy order withholding the patent. There was such an order of secrecy upon another invention that eventually ripened into a patent described in several paragraphs of the petition, III to VIII, but this "withholding order was rescinded on December 5, 1918." No withholding order was issued on the invention in ques-

tion here and it is in no way connected with the earlier invention.

Upon another phase of the petition the claim is that suit can be maintained under the act of June 25, 1910, as amended by the act of July 1, 1918, 40 Stat. 705. The act of 1910 was intended to give a right of action in the Court of Claims for infringement, when before the act the right of action was confined to contract, express or implied. The amending act of 1918 enlarged the earlier one but is confined to "patented inventions." See *De Forest Radio Telephone Co.* v. *United States*, 273 U. S. 236, 237. An invention "described in and covered by a patent" presupposes the existence of a patent. It is said in *Gayler* v. *Wilder*, 10 How. 477, 493, that the inventor's right is created by the patent "and no suit can be maintained by the inventor against anyone for using it before the patent is issued." It is said in *Marsh* v. *Nichols*, 128 U. S. 605, 612: "Until the patent is issued there is no property right in it; that is, no such right as the inventor can enforce." There is no reason to think that the acts of 1910 and 1918 were intended to confer the right to sue the Government except for infringement of the patent by the Government or its contractor. See *Richmond Screw Anchor case*, decided by the Supreme Court January 3, 1928, 275 U. S. 331.

As already stated, the theory upon which the petition proceeds is a right to maintain the suit under the provisions of the act of October 6, 1917, or under the act of June 25, 1910, as amended by the act of July 1, 1918. (See Paragraph XVI of petition.) In its brief, however, there is an assertion that the Government's use of the process or invention was under an implied contract. The allegations relied on to show an implied contract are less definite than are desirable, under the liberal rule stated in the cases of *Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 569, and *Société Anonyme*, 224 U. S. 309, and it may be noticed that these cases were for the use of patented inventions. Whether the same rule is applicable for the use of an alleged unpatented device, in the absence of an express contract to pay for its use, we need not consider, because in any view

of that question an action upon contract can not be maintained in this case. The use complained of is thus stated in Paragraph XI of the petition: "That the actual use of said invention of a new and useful improvement in methods of making activated carbon by the Government of the United States was begun on or about September 1, 1918, and continued until some time about the middle of the year 1919." The use therefore began and ended more than six years before the original petition was filed, on July 6, 1927. This furnishes a complete answer to a suit upon contract and to a suit founded on the act of 1910, as amended by the act of 1918, as well, because of the bar of the statute of limitations which in this court is jurisdictional. It is said in the *Berdan case*, *supra* (p. 570): "We are of opinion that the Court of Claims ruled correctly that the statute of limitations was a bar to any recovery for the use of the patented invention prior to six years before the action was commenced."

The demurrer to the amended petition should be sustained and the petition dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

HENRY H. ARNOLD v. THE UNITED STATES

[No. E-329. Decided February 20, 1928]

On the Proofs

Aviation pay; duty requiring flights.—See *Emmons case*, 63 C. Cls. 121.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Cornelius H. Bull* and *King & King* were on the brief.

Mr. James J. Lenihan, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. John G. Ewing* and *Frank J. Keating* were on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, Henry H. Arnold, entered the service of the United States as a cadet at the United States Military Academy at West Point, N. Y., in 1903, and from the date of his graduation therefrom has served continuously in the United States Army as a commissioned officer on active duty.

II. The plaintiff served in the United States Army in the following grades and during the following periods of time: Captain, from April 1, 1917, to June 26, 1917; major, from June 27, 1917, to September 4, 1917; colonel, from September 5, 1917, to July 31, 1918, and from June 1, 1920, to June 30, 1920.

III. May 20, 1916, the War Department issued to plaintiff Special Orders, No. 119, of which paragraph 35 is as follows:

"Upon the recommendation of the Chief Signal Officer, First Lieut. Henry H. Arnold, 3d Infantry, is detailed under the provisions of section 2 of an act of Congress approved July 18, 1914, in the aviation section of the Signal Corps, rated as a junior military aviator with the rank of captain, and will proceed via this city for consultation with the Chief Signal Officer to San Diego, Cal., and report in person to the commanding officer Signal Corps Aviation School for duty. The travel directed is necessary in the military service."

On January 18, 1917, the War Department issued the following Special Orders, No. 15:

"Captain Henry H. Arnold, junior military aviator, Signal Corps, is announced as on duty that requires him to participate regularly and frequently in aerial flights from October 18, 1916."

This special order was never revoked during the period for which flying pay is claimed here.

The following orders were also issued to the plaintiff:

SPECIAL ORDERS No. 129 | WAR DEPARTMENT, *Washington, June 5, 1917.*

[Extract]

* * * * *

2. Maj. Henry H. Arnold, junior military aviator, Signal Corps, now on temporary duty in this city, is relieved from

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further duty in the Canal Zone and will report in person to the Chief Signal Officer of the Army for duty in his office. (2607572, A. G. O.)

* * * * *

By order of the Secretary of War:

TASKER H. BLISS,
Major General, Acting Chief of Staff.

Official:
H. P. McCAIN,
The Adjutant General.

SPECIAL ORDERS No. 144–C

WAR DEPARTMENT,
Washington, June 20, 1919.

[Extract]

* * * * *

PAR. 68. The rating of Colonel Henry H. Arnold, junior military aviator, Air Service (Aeronautics), as military aviator, to date from May 20, 1919, is announced.

By order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

IV. Plaintiff, on April 1, 1917, was on duty in Panama with the 7th Aero Squadron. At that time he was ordered by the commanding general of the Canal Zone to proceed to New York to secure equipment for this squadron. Plaintiff reported to the commanding general of the Eastern Department, who verbally directed him to proceed to Washington, D. C., arriving about the 10th of April, 1917. He reported to the Chief Signal Officer of the United States. He was assigned to temporary duty in the office of the aeronautical division of the Signal Corps.

Upon being placed on temporary duty in Washington in April, 1917, plaintiff was placed in charge of the information division. His duties consisted in collecting and distributing all classes of military aeronautical information, which included technical information concerning new types of aeroplanes and equipment, standard training information con-

cerning the training of aviators, and all foreign information that it was possible to receive. Plaintiff was required to have an intimate knowledge of all branches of aviation and it was his duty to make inspections of the various kinds of equipment in use, and in order to properly perform his duties it was necessary to engage in regular and frequent flights. Plaintiff was on this particular duty until about the middle of August, 1917, when he was made assistant executive officer of the air division of the Signal Corps. His duties as such required that he be familiar with all Air Service activities, including supplies and production of aeroplanes, training of men, and use of material. In order to perform his duties as such assistant it was necessary for him to make frequent inspections of aeroplanes and aeroplane stations to ascertain conditions existing at such stations and the condition of the planes themselves. In order to do this plaintiff had to fly aeroplanes at various stations in order to make his reports on their condition when he returned to Washington.

Plaintiff served as assistant executive of the Air Service until October, 1917, when he was made executive officer of the air division. This change of position did not in any way change the duties of the plaintiff, but was only a change in name, and plaintiff still continued to fly planes as a pilot as the necessity therefor arose.

Upon the frequent inspection trips to the various air stations made by plaintiff incident to his duties he made a ground inspection with regard to the discipline of the men and the cadets, and the method of training, mess facilities, and inspection of aeronautical supplies. A technical inspection was then made involving the actual examination of each aeroplane that was present at the station and then flying such of them as he deemed necessary to fly.

Plaintiff made inspection trips in February, 1918, to Essington, Pa., Buffalo, N. Y., Detroit, Mich., Columbus, Ohio, Belleville, Ill., Dayton, Ohio, Memphis, Tenn., and Little Rock, Ark., and at such stations where aeroplanes were available plaintiff flew such aeroplanes as were necessary to gain knowledge of the equipment of the station. He returned to Washington about the middle of March, 1918.

From March, 1918, to August 1, 1918, plaintiff was on the control board of the aeronautical division of the Signal Corps, the duties of which board were to investigate new types of aeroplanes and accessories and make recommendations covering these aeroplanes relative to their production for the use of the Army. This necessitated an intimate knowledge of the aeroplanes and engines, which plaintiff obtained by actual flying in order to determine the best types. He flew foreign types as well as domestic types.

V. During the period from April 10, 1917, to June 5, 1917, plaintiff performed three flights in Government aircraft, as follows:

May 8, 1 flight of 45 minutes.
May 15, 1 flight of 50 minutes.
May 25, 1 flight of 65 minutes.

During the period from June 5, 1917, to July 31, 1918, plaintiff performed twenty-nine flights as follows:

August 9, 2 flights, 65 min.
September 12, 4 flights, 1 hour and 15 min.
October 10, 4 flights, 1 hour and 45 min.
February 28, 10 flights, 1 hour and 55 min.
March 2, 4 flights, 40 min.
March 4, 2 flights, 1 hour and 10 min.
March 30, 3 flights, 1 hour.

During the period from June 1, 1920, to June 30, 1920, plaintiff was on a status of leave, and during this time made two flights:

June 15, 1 flight, 47 minutes.
June 16, 1 flight, 40 minutes.

VI. Plaintiff received no increase in pay for flying for the periods of April 1, 1917, to July 31, 1918, and June 1, 1920, to June 30, 1920.

VII. If plaintiff is entitled to increased aviation pay during the periods from April 1, 1917, to July 31, 1918, and from June 1, 1920, to June 30, 1920, he should receive $3,065.66.

The court decided that plaintiff was entitled to recover.

Opinion of the Court

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This case, in all material aspects, is controlled by the decision of this court in the case of *Emmons* v. *United States*, decided February 14, 1927, 63 C. Cls. 121. In *Clark's case*, 60 C. Cls. 589, 591, it was said: "When an officer is on duty requiring him to participate regularly and frequently in aerial flights, he is entitled to the pay provided for in the statute during the time he is on such duty from the day he is placed on such duty until he is detached therefrom." In *Bradshaw's case*, 62 C. Cls. 638, 644, it was said: "This service involved unusual hazard, and the purpose of Congress in providing for extra pay was to compensate for the hazard of the special service." See also *Marshall's case*, 59 C. Cls. 900; *Matteson's case*, 60 C. Cls. 880; and *Lynch's case*, 63 C. Cls. 91. It was said in *Luskey's case*, 56 C. Cls. 411, "that when an enlisted man is detailed for duty involving actual flying in aircraft, he is entitled to the pay provided for in the statute during the time he is detailed for such duty from the day of such detail until the detail expires" (p. 413). This decision was affirmed by the Supreme Court of the United States, 262 U. S. 62. In the course of the opinion it was said (p. 64): "Congress naturally supposed that there would be no detail to aircraft duty unless there was requirement or use for it, and when either ceased the detail would be revoked; but if made and not revoked, its duration constituted a service for which the officer must keep prepared and to which, therefore, the compensation was by the statute assigned." We regard this question as so thoroughly settled by these decisions that further discussion is unnecessary.

On the question of the statute of limitations, see *Cronin case*, 62 C. Cls. 20; Soldiers and Sailors Civil Relief Act, 40 Stat. 440, section 205. Judgment should be awarded to the plaintiff. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

FRANK D. SCHROTH, RECEIVER OF CAPE MAY REAL ESTATE CO., v. THE UNITED STATES

[No. C-669. Decided February 20, 1928]

On the Proofs

Eminent domain; just compensation.—Just compensation allowed for the taking of certain lands by the President's proclamation of December 2, 1918, issued under authority of the act of October 6, 1917, as amended by the act of July 1, 1918.

Counterclaim; contract for dredging; substantial performance by contractor.—In pursuance of a proviso contained in the appropriation act of March 2, 1907, the company of which plaintiff is receiver agreed to perform the dredging work in the construction of a harbor suitable for commerce, of which 400 acres should have a depth of 30 feet. The inlet to the harbor was a Government channel with a permanent depth of 25 feet, which limited the availability of the harbor. The company dredged 250 acres of the harbor and a channel from the harbor proper to the inlet, both to a depth of 30 feet, a large portion of the remainder of the harbor having a depth of from 20 to 30 feet, making the harbor suitable for commerce. *Held*, that in the absence of actual damage the Government can not recover on a counterclaim for failure to attain a 30-foot depth over the entire 400 acres.

The Reporter's statement of the case:

Mr. Thomas F. Gain for the plaintiff. *Mr. Ira Jewell Williams* was on the brief.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Cape May Real Estate Company is, and at the time hereinafter referred to was, a corporation created by and existing under and by virtue of the laws of the State of New Jersey.

II. On July 17, 1920, the plaintiff, Frank D. Schroth, was appointed receiver of Cape May Real Estate Company by decree of the Court of Chancery of New Jersey, and immediately filed his bond, qualified as receiver, and entered upon the duties of his office.

III. The said plaintiff, Frank D. Schroth, receiver as aforesaid, and the Cape May Real Estate Company, by its officers and agents, have at all times borne true allegiance to the United States of America, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

IV. The plaintiff, Frank D. Schroth, as receiver of the Cape May Real Estate Company, is the sole owner of the claim herein presented subject to encumbrances, liens, and transfers appearing herein in Finding XXVII.

V. On May 4, 1903, the Cape May Real Estate Company acquired from Peter Shields and wife, by deed of conveyance, recorded in the office of the clerk of the county of Cape May, New Jersey, in Book 179, p. 393, approximately 390.70 acres of land at Cape May known as "Poverty Beach," no longer known as "Poverty Beach." The above-described deed covered a portion of the tract of land requisitioned by the President on December 2, 1918.

On May 5, 1903, the Cape May Real Estate Company acquired by deed of survey and conveyance, and recorded in the office of the surveyor general at Burlington, New Jersey, in Book JJ, p. 241, approximately 437.72 acres of other land at Cape May, a portion of which was included within the requisitioned tract above referred to.

On July 2, 1903, the Cape May Real Estate Company acquired from the Riparian Commission of the State of New Jersey, by deed recorded in the office of the Riparian Commissioners at Jersey City, New Jersey, in Liber P, p. 389, certain underwater lands at Cape May, New Jersey, extending into the Atlantic Ocean about 2,000 feet.

On February 2, 1904, the Cape May Real Estate Company acquired from the Board of Proprietors of West New Jersey a deed of survey and conveyance, recorded in the office of the surveyor general at Burlington, New Jersey, Book JJ, p. 252, of surveys, an additional acreage at Cape May of approximately 1,771.81 acres of land.

On January 17, 1907, the Cape May Real Estate Company acquired from the Riparian Commission of New Jersey by deed, recorded in Book 216, p. 459, in the office of the clerk of the county of Cape May, New Jersey, a grant of land

under water at Cape May, New Jersey, which was adjacent and on the south boundary line of the mainland formerly acquired as aforesaid, beginning at the junction of Beach Avenue and Madison Avenue and extending into the Atlantic Ocean a distance of 4,000 feet.

Under and by virtue of the above-mentioned conveyances the Cape May Real Estate Company, on the respective dates thereof, acquired the lands, including the underwater lands, a part of which are embraced in the requisitioned area.

In 1903 the Cape May Real Estate Company prepared a plat of a part of its aforesaid lands, dividing the same into lots, blocks, and streets, known as plan A, and filed the said plan in accordance with law. The lands within the streets shown on plan A were dedicated to the city of Cape May, New Jersey.

VI. By virtue of the authority of the act of Congress, approved October 6, 1917, c. 79, sec. 1, 40 Stat. 345, 371, as amended by the act of July 1, 1918, c. 114, 40 Stat. 704, 720, Woodrow Wilson, President of the United States, on December 2, 1918, issued a proclamation, a copy of which appears as "Exhibit A" to the plaintiff's petition in this case by the terms of which the President of the United States, on behalf of the United States of America, did take title to and possession of all that portion of the following-described tract of land, not then owned by the United States, to wit:

"Beginning at the point of intersection of the westerly line of Yale Avenue if extended in a northerly direction, with the high-water line of Cold Spring Harbor, which said avenue is shown on a certain plan of lots of the Cape May Real Estate Company, which said plan is called 'Plan A' and is duly recorded in the office of the clerk of the county of Cape May, New Jersey, in Plan Book No. 1, pages 31 and 32; thence in a general easterly, then southerly, and then westerly direction following the high-water line of Cold Spring Harbor, Cold Spring Inlet, and the Atlantic Ocean to its point of intersection with the westerly line of said Yale Avenue extended in a southerly direction; thence in a line of said Yale Avenue to the point of beginning. Containing in all three hundred and forty-nine acres, more or less, together with all improvements on said tract of land not now owned by the United States, and together with

all riparian rights, privileges, easements, and other rights whatsoever appurtenant or appertaining in any way to said above-described tract of land, including all privately owned rights in the underwater lands lying between the high-water line of said above-described tract of land and the pierhead or bulkhead lines as such lines are now or may be hereafter established. Said tract or land is more definitely shown on a certain blue print on file in the office of the Solicitor, Department of the Navy, said blue print being marked 'Exhibit No. 2' and being attached to a certain report of a board of investigation convened at section base, Cape May, New Jersey, October 9, 1918, to inquire into the proposed acquisition of property at Cape May, New Jersey."

VII. Pursuant to the said proclamation of the President of the United States, dated December 2, 1918, possession of and title to the said tract of land was taken on behalf of the United States by the Secretary of the Navy and a written notice thereof under date of January 6, 1919, was served upon the Cape May Real Estate Company. A copy of said notice is attached to plaintiff's petition as "Exhibit B," and is hereby by reference made a part of this finding. This notice, dated January 6, 1919, was sent by J. B. Patton, commander of district patrols of the fourth naval district, and was addressed to N. Z. Graves, president of the Cape May Real Estate Company et al., and was duly received by him.

VIII. With the said notice from Commander J. B. Patton was enclosed copy of a letter dated December 26, 1918, from F. D. Roosevelt, Acting Secretary of the Navy, to the commandant of the fourth naval district, Philadelphia, Pa., authorizing and directing the commandant to take possession on behalf of the United States in accordance with the proclamation of the President, of the tract of land described in the proclamation, and there was also enclosed a copy of the President's proclamation of December 2, 1918. Copies of these enclosures appear as Exhibits "B" and "C" attached to plaintiff's petition, and are by reference hereby made a part of this finding.

IX. Pursuant to the said notice and in accordance with the proclamation of the President, dated December 2, 1918, as aforesaid, and in accordance with the authority con-

tained in the said letter from the Acting Secretary of the Navy, possession of the commandeered tract was surrendered to the United States Government, and thereafter the said property remained in the exclusive possession of the Government.

X. The tract of land taken over by the President of the United States for and on behalf of the United States, comprising a total area of 336.97 acres, was bounded on the north by Cold Spring Harbor, on the east by Cold Spring Inlet, on the south by the Atlantic Ocean, and on the west by the westerly line of Yale Avenue. The tract of land was made up of the following more or less distinct portions:

1. Plan A containing 61.59 acres was subdivided into lots fronting on the northerly side of Beach Avenue, lots fronting on the southerly side of New Jersey Avenue and extending from Yale Avenue to Sewells Point. The acreage above mentioned included 23.18 acres in the streets.

2. Plan B contained 242.38 acres. The streets and lots had been plotted but not physically laid out upon the ground.

3. An acreage of approximately 33 acres lying between Beach Avenue and the West Jetty known as the accreted lands.

4. The riparian rights along the Atlantic Ocean from Yale Avenue eastward, a distance of 4,690 feet; and riparian rights along the Cold Spring Harbor frontage extending eastward from Yale Avenue some 4,842 feet.

All of the above-described property is located east of the west line of Yale Avenue, as appears on the plat annexed to these findings as Exhibit A.

Several acres in Plan A had eroded by reason of a storm in the summer of 1918 between Yale Avenue and California Avenue.

XI. Of the total area requisitioned under and by virtue of the President's proclamation of December 2, 1918, the Cape May Real Estate Company was, at the time of said proclamation, the owner, subject to the liens, assignments, and encumbrances of record referred to hereinafter in Finding XXVII, of the following lots on plan A of the map of the Cape May Real Estate Company, namely:

Nine lots on Beach Avenue, numbers 7181 to 7189, inclusive.

Twenty-eight lots on the south side of New Jersey Avenue, numbers 5955 to 5967, inclusive; 7216 to 7221, inclusive, 7206 to 7214, inclusive.

Sixty and one-half lots on the north side of New Jersey Avenue, numbers 5938 to 5952, inclusive; 6346 to 6360, inclusive; 6791 to 6793, inclusive; 6803 to 6805, inclusive; 7389 to 7411, inclusive; 7250 and a half of 7236.

The Cape May Real Estate Company is also the owner, subject to the encumbrances hereinafter referred to in Finding XXVII, of the 242.38 acres contained in plan B; and of the 33 acres of accreted land between Beach Avenue and the west jetty. The said company was also the owner of the riparian rights along the Atlantic Ocean frontage from Yale Avenue eastward, a distance of 4,690 feet, and of the riparian rights along Cold Spring Harbor from Yale Avenue eastward, a distance of 4,842 feet.

XII. The title of the Cape May Real Estate Company to the several tracts and parcels of land was acquired, in connection with other lands, and title to the said riparian rights was acquired under a series of deeds and grants, by virtue of which the Cape May Real Estate Company acquired title in fee simple to all of the land embraced within the commandeered area, and a fee-simple title to the riparian rights both along the Atlantic Ocean frontage and along the Cold Spring Harbor frontage.

XIII. Certain adverse claims of title to the lands of the Cape May Real Estate Company, both within and without the area commandeered under the proclamation of the President, dated December 2, 1918, as aforesaid, having been asserted by one Marion R. Owen and Horatio F. Howard, appropriate proceedings to quiet title were instituted by the plaintiff, Frank D. Schroth, as receiver of Cape May Real Estate Company, against the said Marion R. Owen and Horatio F. Howard, in the court of chancery of the State of New Jersey, in two certain causes known as case No. 1 and case No. 2. The said cases were so proceeded with that a final judgment and decree of the said court of chancery was entered therein under date of September 30,

1925, ordering, adjudging, and decreeing that as to all the lands and premises to which the said defendants made claims, the said defendants, and each of them, have no estate, interest in, or any encumbrance upon the same, or any part thereof, and that in respect to all of said lands and premises so far as relates to any claim thereon by the said defendants, the title of the plaintiff, Frank D. Schroth, receiver of Cape May Real Estate Company, was determined, settled, and decreed to be good.

XIV. On August 1, 1921, the board on valuation of commandeered property, appointed by the Secretary of the Navy to consider the question of the just compensation due owners of the property and rights therein taken over by the United States for the naval air station at Cape May, New Jersey, under the proclamation of December 2, 1918, filed with the Secretary of the Navy its report in which it recommended an award of $206,080 for the aforesaid property and rights of said Cape May Real Estate Company. Said award was duly approved by the Secretary of the Navy.

XV. The amount of $206,080, so determined, was unsatisfactory to the plaintiff, Frank D. Schroth, receiver as aforesaid, and by letter dated May 3, 1923, from the plaintiff to the Secretary of the Navy, notice of plaintiff's refusal to accept the said award for the land, riparian rights, and property of the Cape May Real Estate Company was given to the Secretary of the Navy, and formal demand made by the plaintiff for payment of seventy-five per centum of said award, amounting to $154,560. Neither that sum nor any part thereof has at any time been paid by the United States to the plaintiff.

XVI. The property included within the commandeered tract constituted the eastern portion and about one-third of the total area of the development of the Cape May Real Estate Company. This development, sometimes referred to as New Cape May, adjoined the old city of Cape May at Madison Avenue and extends eastwardly from Madison Avenue to Sewells Point and Cold Spring Inlet; the whole tract being, however, within the municipal limits of the city of Cape May.

XVII. The titles to the various tracts of land, riparian rights, etc., comprising the company's holdings, were acquired during the period from 1903 to 1907. A considerable portion of the area had originally been marsh or meadow land, which by dredging and filling operations conducted by the company had been brought up to an elevation above high water, especially around the beach front of the harbor. By means of hydraulic dredges a harbor covering over 400 acres was constructed to the north of and adjacent to the property, the excavated material amounting to some 19,785,580 cubic yards being placed upon the land. Of this total about 7,350,000 cubic yards had been placed upon the portion of the property east of Yale Avenue, referred to as the commandeered area.

XVIII. The development of the Cape May Real Estate Company was for a high-class seashore resort and was advantageously situated for that purpose. The city of Cape May is located at the southernmost point of the State of New Jersey where the Delaware River, or Delaware Bay, and the Atlantic Ocean meet. It has an attractive all the year around climate tempered by the Gulf Stream. It is part of the mainland and is approached by concrete roads. It has a fine beach with a gradual slope. Both the Pennsylvania Railroad Company and the Reading Railroad Company have steam lines to Cape May. There adjoins the property a harbor, more than 400 acres in extent, about half of which has a depth of water between 30 and 40 feet, and a large portion of the remainder being between 20 and 30 feet in depth. This harbor, dredged by the Cape May Real Estate Company, is connected with the Atlantic Ocean by Cold Spring Inlet, constructed by the United States Government. The inlet was formed by the construction of two large stone walls or jetties extending nearly a mile into the ocean as a protection to the channel between, which was dredged by the Government to a depth of 25 feet at low water.

XIX. Cold Spring Harbor is the only landlocked harbor of deep water on the Atlantic coast from Sandy Hook to Newport News. It is available as a harbor of refuge for vessels of comparatively large draft. It had developed considerable commercial usefulness as a point for fuel and sup-

plies for vessels and as a base for the fishing fleets and for coastal naval operations of the Government, both during the late war and in times of peace. The Corinthian Yacht Club was located fronting on the harbor and adjoining the west side of Yale Avenue immediately adjacent to the portion of the property taken by the Government under the President's proclamation of December 2, 1918. This club had been practically closed prior to December 2, 1918.

XX. The Cape May Real Estate Company's development was divided into two major portions: "Plan A" and "Plan B." "Plan A" consisted of the portion of the property between Madison Avenue and Pittsburgh Avenue and extending from the Atlantic Ocean some 10 or 12 blocks to the northward. "Plan A" also included all of the land between Beach Avenue and New Jersey Avenue and halfway between New Jersey Avenue and New York Avenue for the entire distance eastward to Sewells Point. About December, 1918, all of the streets in "Plan A" had been actually opened, graded, and surfaced with gravel. Cement curbs and sidewalks had been constructed between Madison Avenue and Pittsburgh Avenue and throughout "Plan A" a large number of first-class cottages had been constructed. There was no water or sewerage installed in the requisitioned area save a small pipe constructed by the Government to the naval air station along Yale Avenue, and a similar pipe to Sewells Point. In the block between Pittsburgh Avenue and Baltimore Avenue, extending from Beach Avenue to New Jersey Avenue, there had been erected the new Cape May Hotel, a brick structure costing about $1,000,000. Along Beach Avenue for several blocks east of the hotel had been constructed a number of fine residences. Beach Avenue was a broad thoroughfare 102 feet in width extending along the Atlantic Ocean to Sewells Point. On the northerly side of it were constructed cement sidewalk and cement curbing, while on the ocean side it had a twenty-foot boardwalk, protected by a bulkhead, which extended to Sewells Point. New Jersey Avenue was likewise graded its entire distance and had a gravel surface as far eastward as California Avenue. The cross streets, running north and south, were graded and

improved with cement curbs and sidewalks from Beach Avenue to New Jersey Avenue.

XXI. "Plan B" was the portion of the property outside of "Plan A." It was being made ready for sale, and prior to December 2, 1918, had been brought up to the established grade, with the exception of certain areas. The portion of "Plan B" east of Yale Avenue (in the commandeered area) had been completely filled with the exception of the two small areas designated as "Low Area No. 2" and "Low Area No. 4." The established grade at the middle line of the tract was between 12 and 13 feet above low water and sloping slightly toward the beach and toward the harbor to a point 8 feet above low water for purposes of drainage. The low areas No. 2 and No. 4 above mentioned would have required about 244,000 cubic yards to bring them to the established grade.

XXII. The western boundary of the tract included in the President's proclamation of December 2, 1918, was the westerly line of Yale Avenue. Yale Avenue was physically opened, graded, and surfaced with gravel throughout its entire length from Beach Avenue to the harbor. The cement curbs and sidewalks had been constructed. This avenue was the means of approach to the Corinthian Yacht Club which fronted on the harbor. The fence erected by the Government was located on the easterly line of Yale Avenue and the street was not in fact closed to public use. The whole of the bed of Yale Avenue, however, was within the lines of the commandeered tract.

XXIII. At Sewells Point had been erected a large casino or amusement pavilion adjacent to the harbor and the shore end of Cold Spring Inlet. This casino was destroyed by fire on July 4, 1918, and had not been rebuilt prior to December 2, 1918. At this point also was located by the city of Cape May a wharf or boat landing which was the terminus of a line of pleasure boats which operated between Sewells Point and Wildwood Crest, a near-by summer resort. This landing had served as a terminus for street cars which formerly ran to Sewells Point, but which line had not been operated since 1916.

XXIV. An electric street railway, known as Cape May, Delaware Bay & Sewells Point Street Railway Company had, prior to 1917, operated a line of passenger cars from Cape May, partly along Beach Avenue to Madison Avenue, and thence along New Jersey Avenue to Sewells Point. During the period of the war, while the United States Government was in occupation under a nominal lease of the premises afterwards commandeered, the Government made use of the tracks and other facilities for the transportation of materials and supplies to the Government base at Sewells Point.

XXV. During the several years constituting the period of the World War market conditions affecting seashore developments were adverse. The city of Cape May was a more popular summer resort sixteen or eighteen years prior to the requisition than at the time of said requisition. There was only one residence on the requisitioned area, which was a stucco house, in a state of disrepair. Following the armistice in November of 1918 conditions for the development and marketing of seashore property became more favorable.

XXVI. The total holdings of the Cape May Real Estate Company within the lines of "Plan A" and "Plan B," and together with the accreted area of 33 acres and the riparian rights along the Atlantic Ocean frontage and the riparian rights along the harbor frontage, together with the bed of Yale Avenue, all within the commandeered area, as of December 2, 1918, were of the fair and reasonable market value in the aggregate of $365,500.

XXVII. The property of the Cape May Real Estate Company lying within the bounds and limitations of the tract of land described in the proclamation of the President, dated December 2, 1918 (No. 1504), as of the date of the commandeering by the United States was subject, *inter alia*, to the following encumbrances and liens:

(1) Mortgage deed of trust to the Colonial Trust Company, dated July 1st, 1907, and recorded in Bk. 180, folio 207, made to secure the issue of 3,500 bonds of $1,000.00 each. The same covers all the property of the said company on Plan A.

(2) Four mortgages to Nelson Z. Graves, dated and recorded as follows:

(*a*) Dated February 21st, 1912, and recorded in Bk. 106, folio 146, amount $250,000.00, with interest at 6%.

(*b*) Dated January 8th, 1913, and recorded in Bk. 112, folio 320, for $75,000.00, with interest at 6%.

(*c*) Dated January 14th, 1913, and recorded in Bk. 120, folio 73, for $30,000.00, with interest at 6%.

(*d*) Dated February 14th, 1914, and recorded in Bk. 122, folio 472, for $25,000.00, with interest at 6%.

All of which said last-mentioned four mortgages are now vested in the Mutual Liquidating Company by virtue of an assignment of the same, dated August 12th, 1915, and recorded in Book of Assignment No. 16, folio 1.

(3) Judgment, *Colonial Trust Company, Trustee*, v. *Cape May Real Estate Co.* New Jersey Supreme Court, November term, 1910, page 289, amount $357,950.21, with interest at 6% and costs, dated December 29th, 1910, Judgment, vol. 5, page 174.

(4) Judgment, *Peter Shields* v. *Cape May Real Estate Company.* New Jersey Supreme Court, June term, 1917, folio 315; amount $62,083.50, with interest at 6% and costs, dated October 25th, 1917, Judgment, vol. 10, page 408. Now pending on rule to show cause why judgment should not be opened.

Assignment to Henry Darlington, jr., dated August 5th, 1918, and recorded in Book H of Assignments, page 598.

XXVIII. On June 25, 1907, a contract was executed by the Cape May Real Estate Company in the form appearing as Exhibit A to defendant's counterclaim, which is by reference made a part hereof. This document was not signed or executed by anyone on behalf of the United States. This document recites the appropriation of $311,000 for the improvement of Cold Spring Inlet by the act of Congress approved March 2, 1907 (Public, No. 168), and recites further that, in consideration of the expenditure of said appropriation in the improvement of Cold Spring Inlet, the company accepted the proviso of the said act of Congress, and further agreed to construct prior to September 30, 1909, by excavation or otherwise, immediately inshore of said Cold Spring Inlet and connected therewith, a harbor suitable for commerce, of which at least 400 acres shall have a depth

of not less than thirty feet at mean low water. The time for performing this work was later extended to September 30, 1914.

XXIX. Before the time for finishing the harbor work was extended to September 30, 1914, the whole situation was reviewed in a letter from Major R. R. Raymond, in charge of the U. S. Engineers Corps for the Wilmington district, who, on May 17, 1911, sent to Mr. N. Z. Graves, the president of the Cape May Real Estate Company, a letter. This letter reads in part as follows:

"The question to be determined is, What work is necessary to make the present harbor available? About 250 acres of the basin is now dredged to 30 feet; the Government channel is to be 25 feet deep.

"To make the present harbor available, therefore, requires the dredging of the Government channel to twenty-five feet and the dredging of a channel connecting the Government channel with the basin. The dredging to be done at the expense of the Cape May Real Estate Company to accomplish this is about 1,360,000 cubic yards, which, at, say, 6 cents per yard, will cost $81,600."

XXX. The amount of dredging involved in excavating the area of 400 acres to a depth of thirty feet would be 19,360,000 cubic yards. The Cape May Real Estate Company actually excavated from the harbor a total of 19,785,580 cubic yards. This excess yardage was due to the fact that a portion of the harbor was dredged to a depth in excess of thirty feet, and to the further fact that part of the dredging was in an area outside of the 400 acres.

XXXI. When the dredging work was discontinued in April, 1913, there would have been required additional excavations of 3,900,000 cubic yards to bring the harbor to a continuous depth of thirty feet over an area of 400 acres. The channel or inlet between the jetties which, for the distance of a mile, formed the entrance to the harbor from the ocean was dredged by the Government to a depth of twenty-five feet, and there is no authorization or plan for any greater depth. The availability of the harbor for commerce would be limited by the depth of the entrance channel—twenty-five feet.

XXXII. The amount of dredging or excavation necessary to bring the harbor to a continuous area, so that all of the 400 acres would have a depth of at least 25 feet, corresponding to the depth of the entrance channel, would be 2,500,000 cubic yards.

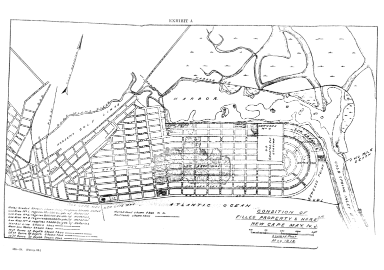
XXXIII. In May, 1911, the portion of the harbor already dredged to a depth of thirty feet was about 250 acres, and a large portion of the remaining area had a depth of between twenty feet and thirty feet. The work still necessary to make the harbor, as it then existed, available and suitable for commerce and navigation consisted of the dredging by the Government of the channel between the jetties to a depth of twenty-five feet, and the dredging of a channel from the harbor basin to the shore end of the jetties. According to the surveys and records of the United States Engineer's office at Wilmington, the amount of further dredging to be done by the Cape May Real Estate Company to accomplish this amounted to 1,360,000 cubic yards.

XXXIV. Pursuant to the recommendations of the United States Engineer's office, the Cape May Real Estate Company, through its president, Mr. Graves, proceeded to acquire a dredge and perform the work in accordance with the directions of that office. All of the dredging work indicated in the letter of Major Raymond as necessary to make the harbor available was actually done. The Government channel between the jetties was brought by the Government to the contemplated depth of twenty-five feet; and the Cape May Real Estate Company completed the channel from the harbor basin proper to the shore end of the jetties, connecting with the Government channel. The Cape May Real Estate Company dredged the channel to a depth of thirty feet and 400 feet to 600 feet in width, excavating or dredging a total of 2,750,000 cubic yards, about twice the amount specified by Major Raymond; the excess being done outside the line of the channel but within the lines of the harbor.

XXXV. No dredging work was done in the harbor by the Cape May Real Estate Company after April, 1913. The extension of time for finishing the harbor work under the arrangement with the Government expired September 30,



EXHIBIT A



258—28. (Face p. 92.)

1914. None of the dredging work in the harbor was ever actually done by the Government or on its behalf.

XXXVI. There was no evidence of the market price for doing dredging work in the vicinity of Cold Spring Inlet in the years 1913 or 1914.

It appears that the cost of doing dredging work in this general vicinity was about the same during the years 1913, 1914, and 1915. The cost of doing such dredging work was nearly uniform from the year 1900 up to 1914 on an average, any slight raise in costs being offset by the advance in the state of the art. The dredging work in this harbor was about the simplest type of hydraulic dredging, and the sum of six cents per cubic yard would have been sufficient to cover the cost of doing such dredging in the harbor whether the work was done by the Cape May Real Estate Company or by the Government.

The court decided that plaintiff was entitled to recover $365,500 with interest from December 2, 1918, until paid. Counterclaim dismissed.

MOSS, *Judge*, delivered the opinion of the court:

Plaintiff, Frank D. Schroth, receiver of Cape May Real Estate Company, is suing to recover the fair and reasonable market value as of December 2, 1918, of the property taken on that date. The defendant has interposed herein a counterclaim based on the following transaction: On June 25, 1907, the Cape May Real Estate Company entered into a contract with the Government by which it undertook to perform the dredging work in the construction of a harbor suitable for commerce, of which 400 acres should have a depth of 30 feet at mean low-water mark. The work was to be completed September 30, 1909. The time was subsequently extended to September 30, 1914. In May, 1911, the portion of the harbor already dredged to a depth of 30 feet was about 250 acres, and a large portion of the remaining area had a depth of between 20 feet and 30 feet. On and after that date the work was under the supervision and direction of Major Raymond, United States engineer, and was done in conformity with the requirements of his office.

While the 30-foot depth was not reached over the entire 400-acre area, all the dredging necessary to make the harbor suitable for commerce was actually done. There is no evidence of actual damage to the Government because of the fact that the harbor was not completed throughout the entire area to the depth of 30 feet. There can be no recovery herein on account of the counterclaim.

The sole remaining question is the fair and reasonable market value of the property taken by the Government as of December 2, 1918, the day and date of taking. The court has found such value to be $365,500.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

LIBBY, McNEILL & LIBBY v. THE UNITED STATES

[No. E-607. Decided February 27, 1928]

On the Proofs

Contract for milk; ascertainment of profit; actual cost.—In a contract for sale of milk to the Government, under which certain excess profits were to be refunded, the correct ascertainment of profit was upon the actual cost of filling the particular order, where only one order was given, and not upon the average cost of that and all other orders given to the contractor in his year's business.

The Reporter's statement of the case:

Mr. W. Parker Jones for the plaintiff. *Mr. William H. Long* was on the brief.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff herein, Libby, McNeill & Libby, is a corporation duly organized and existing under the laws of the State of Maine.

II. The milk manufacturers, among whom was the plaintiff herein, entered into an agreement with the defendant on November 14, 1917, for the sale of milk to the Army, Navy,

and Marine Corps for the period from November 1, 1917, to December 31, 1918, which agreement was subsequently reduced to writing by the chairman of the milk manufacturers war committee, and contained among others the following provisions:

"The milk manufacturers agree that profit made on sales to the Army, Navy, and Marine Corps, as an average for the period in question, shall not be more than 42¢ per case on evaporated milk and 59¢ per case on condensed milk, calculated on the basis of Federal Trade Commission cost accounting, as set forth in the pamphlet issued by the Federal Trade Commission under date of July, 1917, entitled 'Uniform contracts for cost accounting, definitions, and method.' * * *

"The price which the Army, Navy, and Marine Corps shall pay for milk purchased in the respective months shall be determined as follows: [Provision is here made that the basis of the price would be the market price existing the first part of each month, less a proper differential representing freight, bringing the price to an f. o. b. factory basis.]

"Orders shall be placed after the 20th of the month only for a shipment in a subsequent month, and such orders shall take the price determined for the month in which shipment is designated to be made.

"At the close of the period during which supplies may be purchased on this basis, following January first, 1919, investigation of the costs by the representative companies shall be made by the Federal Trade Commission or some other agency agreed upon by the buyers and manufacturers. In the event that any manufacturer has made, during the period, an average of more than 42¢ per case on evaporated milk and 59¢ per case on condensed milk, the excess above such margin of profit shall be refunded by the respective manufacturers to the Army, Navy, or Marine Corps, respectively. In the event a manufacturer has made less than 42¢ per case provided on evaporated milk and 59¢ per case on condensed milk, neither the Army, Navy, nor Marine Corps shall be obliged to make any additional payments."

III. Pursuant to the foregoing agreement, plaintiff sold and delivered to the Quartermaster Corps of the Army the following quantities of evaporated milk during the months of November and December, 1917, at the rates stated below:

Date	Amount (cases)	Price per case	Total paid
Nov. 11, 1917	1,200	$5.45	$6,540.00
Dec. 6, 1917	1,000	5.65	5,650.00
Do	1,000	5.65	5,650.00
Dec. 8, 1917	1,050	5.55	5,827.50
Dec. 14, 1917	1,050	5.55	5,827.50
Dec. 19, 1917	1,000	5.55	5,550.00
Dec. 20, 1917	1,000	5.55	5,550.00
Do	1,100	5.55	6,105.00
Dec. 21, 1917	1,100	5.55	6,105.00
Do	1,100	5.55	6,105.00
Do	1,400	5.55	7,770.00
Do	700	5.55	3,885.00
Total	12,700		70,565.00

IV. An examination of plaintiff's books was made by the Federal Trade Commission, which found, upon its method of cost accounting, that the cost to the plaintiff of the foregoing deliveries was $62,528.20, or an average of $4.923 per case, and the average price paid for same by defendant was $5.556 per case, which was $0.213 in excess of the allowed profit of $0.42 per case, or a total excess profit of $2,702.80. Said commission further found that the profit made by plaintiff upon all of the evaporated milk, including the aforesaid 12,700 cases, which it sold to the Army, Navy, and Marine Corps during the period of fourteen months referred to in the manufacturers' agreement, averaged $0.305 per case, or $0.115 less than the allowed profit of $0.42 per case.

V. On April 22, 1918, the depot quartermaster, New York City, issued Purchase Order No. 4–1492 to plaintiff for 360,000 cans (7,500 cases) of evaporated milk at $10\frac{13}{24}$¢ per can ($5.06 per case). Delivery thereof was delayed and made in installments during the months of May, June, and July, 1,250 cases being delivered on July 2nd, 1918. The market price existing during the first part of April, 1918, was $5.06 per case; of May, $4.56; of June, $4.21; and of July, $4.805 per case.

The War Department paid the plaintiff the April price for 5,250 cases, the June price for 1,000 cases, and the July price for 1,250 cases, or a total of $36,781.25. On account of delayed deliveries and the provision of the manufacturers' agreement relative to orders placed after the 20th of the month the parties later agreed to adopt the May prices for the entire order (making a total of $34,200), and the differ-

ence to be refunded accordingly. The difference between the amount paid by the War Department and the amount so adopted of $2,581.25 has not been refunded to defendant either in whole or in part.

VI. On December 10, 1918, the quartermaster department of the Army placed with plaintiff an order for 2,000 cases of condensed milk at $7.98 per case, this being the only quantity of condensed milk sold to the Government between November 1, 1917, and December 31, 1918. This condensed milk was delivered on December 23, 1918, and the price paid for same by defendant was $7.98 per case, or $15,960. The cost to the plaintiff of the condensed milk, as found by the Federal Trade Commission upon examination of plaintiff's books, averaged $6.413 per case, by taking as a basis for computing same the average cost to plaintiff of the raw milk used during the entire year 1918 at the plaintiff's plant at Adams Centre, New York, where it was manufactured, together with the average cost of the other accessories, that is, the materials and supplies used and expenses incurred in connection with the manufacture of same during the year. By permitting upon this basis a profit of 59 cents per case, being the maximum profit possible under the manufacturers' agreement, the selling price to the Government would have been $14,006, which is $1,954 less than the amount actually paid therefor by defendant. However, by basing the cost of the condensed milk not upon the general average for the year, but upon the cost of the raw milk used to fill this particular order (using as the basis the average cost of raw milk used at that plant during October, November, and December, 1918), together with the average cost of the aforesaid accompanying materials, the cost to the plaintiff of the condensed milk in question was found by the Federal Trade Commission to be $7.698 per case, or $0.282 per case less than the amount received for same from defendant. By permitting upon this basis a profit of 59 cents per case, being the maximum profit possible under the manufacturers' agreement, the selling price to the Government would have been $16,576, which is $616 more than the amount actually paid therefor by the defendant. In averaging the cost of the cans, labels, and boxes used, the average cost for the year

was taken in both methods above mentioned, being the only practical method of computing same.

VII. The raw milk which was used in the manufacture of the condensed milk in question was purchased by plaintiff subsequent to October 1, 1918, and the cost of this raw milk as shown by the records of the Federal Trade Commission was not less than the average cost of the raw milk purchased by plaintiff at the Adams Centre plant during the months of October, November, and December, 1918.

VIII. After payment by defendant to plaintiff of the amounts hereinbefore mentioned for the three orders of milk aforesaid these accounts were audited by the accounting officers of the Government, who thereupon disallowed the total sum of $7,238.05, as follows: The sum of $2,702.80 upon the shipments in November and December, 1917, as set out in Finding IV, the sum of $2,581.25 in connection with the order of April 22, 1918, as described in Finding V hereof, and the sum of $1,954 upon the order of December, 1918, as described in Finding VI hereof. Thereafter the said amount of $7,238.05 was deducted by defendant from an amount otherwise due the plaintiff under another contract, which made the basis of its suit. Said deduction was originally made in the sum of $7,264.30 on June 2, 1924, and thereafter, on September 29, 1925, defendant paid the plaintiff the sum of $26.25, being the amount which had been deducted in excess of the said sum of $7,238.05.

IX. The goods or supplies referred to were sold and delivered by plaintiff to the United States Marine Corps and the same were paid for by defendant, excepting the amount of $7,238.05.

The court decided that plaintiff was entitled to recover, in part.

MOSS, *Judge*, delivered the opinion of the court:

This case is submitted on a stipulation of facts, no evidence having been presented.

Plaintiff is suing for the recovery of $7,264.30 as the balance due plaintiff under certain contracts and purchase orders for certain supplies sold and delivered to the United

States Marine Corps, at agreed prices, in the year 1924. Defendant contends that plaintiff is indebted to the Government on account of overpayment by the Government on certain transactions occurring in the year 1918 amounting to $4,535.25.

The Government entered into an agreement with plaintiff and other milk manufacturers, effective from November 1, 1917, to December 31, 1918, a period of 14 months, for the sale of milk to the Army, Navy, and Marine Corps, known in the record as the "manufacturers' agreement." This agreement provided for the allowance of an average profit for the entire period of 14 months of 42¢ per case on evaporated milk and 59¢ per case on condensed milk.

Defendant contends that it overpaid plaintiff in the sum of $2,702.80 on certain deliveries of evaporated milk, on the ground that plaintiff's profits were in excess of the profits allowed by the agreement. It appears, however, that the average profit on the evaporated milk for the full period of 14 months was less than 42¢ per case. Plaintiff is entitled to this sum.

The manufacturers' agreement provided that in orders placed after the 20th of the month the price for the month of designated delivery should control. On April 22, 1918, an order was issued for 7,500 cases of evaporated milk. The delivery was delayed, and was made in installments during the months of May, June, and July. Plaintiff was paid on the basis of the April price for 5,250 cases, the June price for 1,000 cases, and the July price for 1,250 cases, a total of $36,781.25. In a controversy between the parties growing out of this transaction it was later agreed that the May price should prevail, and on that basis plaintiff was overpaid in the sum of $2,581.25. Defendant is entitled to a credit in said amount.

Another item of $1,954 claimed by defendant grows out of the following transaction: On December 10, 1918, an order was issued for 2,000 cases of condensed milk at the price of $7.98 per case. It was delivered on December 23, 1918, and plaintiff was paid the contract price, $15,960. In attempting to arrive at the profit to be allowed plaintiff in this transaction the Government took as a basis for computing the

cost of this milk the average cost to plaintiff of the raw milk used at plaintiff's plant during the entire year 1918. By this method plaintiff's profit exceeded the 59¢ profit allowed by the manufacturers' agreement, and amounted to $1,954 excess payment to plaintiff. This was the only order and delivery of condensed milk during the period in which the manufacturers' agreement was operative. In such circumstances it was obviously improper to consider the *average* cost to plaintiff of all the raw milk used by plaintiff for the entire year. The proper method for arriving at the profit in this isolated transaction was to deduct from the selling price the actual cost, which is easily ascertainable, of supplying this particular order. The profit based on actual cost was less than the profit of 59¢ allowed by the manufacturers' agreement.

For the reasons hereinabove set forth plaintiff is entitled to recover $4,656.80, and it is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

FRANCIS J. HARTE v. THE UNITED STATES

[No. D-509. Decided February 27, 1928]

On the Proofs

Commutation of quarters, heat, and light, Navy; act of April 16, 1918; Philippine service; field duty; permanent station.—An officer of the Navy is not on duty in the field merely because he is stationed in the Philippine Islands, and where he was on shore duty at a permanent station therein he was not entitled to the benefits of the act of April 16, 1918, providing for commutation of quarters, heat, and light in right of wife and dependent child.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Cornelius H. Bull* and *King & King* were on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. John G. Ewing* was on the brief.

The court made special findings of fact, as follows:

I. On May 24, 1919, plaintiff was a lieutenant on active duty in the United States Navy serving at the navy yard at Philadelphia, Pa.

II. While serving as aforesaid, plaintiff received the following order from the Navy Department, Washington, D. C., dated May 24, 1919:

"1. On June 16, 1919, you will regard yourself detached from duty at the navy yard, Philadelphia, Pa., and from such other duty as may have been assigned you; will proceed to San Francisco, California, and take passage to Manila on the Army transport sailing on or about July 5, 1919.

"2. Immediately upon arrival at Manila, P. I., report to the senior officer present, naval station, Cavite, P. I., and when directed by him to the commandant, naval station, Olongapo, P. I., for such duty as may be assigned you in the hull division. Report also by letter to the commander in chief, U. S. Asiatic Fleet, and the commandant, sixteenth naval district, for this duty."

III. Pursuant to this order, plaintiff left the navy yard at Philadelphia, Pa., proceeded to San Francisco, Calif., sailed therefrom on Government transport July 5, 1919, reported first to the commandant at Cavite, P. I., and on August 22, 1919, to the commandant at Olongapo, P. I. Plaintiff applied for and was assigned public quarters at Olongapo and occupied them from August 22, 1919, until July 10, 1920.

IV. On July 1, 1920, plaintiff received orders from the commandant at Olongapo, P. I., relieving him from duty at that station and ordering him to Cavite, P. I. Pursuant thereto plaintiff left Olongapo and reported to the commandant at Cavite, P. I., on July 10, 1920. He applied by letter to the commandant at Cavite, P. I., for public quarters, but said commandant by indorsement on plaintiff's application stated that no public quarters were available at that place. Plaintiff remained at Cavite, P. I., until June 30, 1921, and during the period from July 10, 1920, to June 30, 1921, lived and subsisted on board the United States receiving ship *Mohican*.

Plaintiff's dependents consisted of a wife and child, and during the period from May 24, 1919, to January 1, 1922, he maintained a separate place of abode for them consisting

of eight rooms at 2208 South Lambert Street, Philadelphia, Pa., which were actually occupied by his dependents.

V. On January 3, 1921, the Secretary of the Navy, in a letter addressed to the Auditor for the Navy Department, Treasury Department, stated as follows:

"This department is of the opinion that officers of the Navy who are on duty in the Philippine Islands are on duty in the field within the meaning of the act of 16 April, 1918."

And said letter in full was published by the Navy for the information of all concerned as District Circular No. 78–21.

VI. During the period July 5, 1919, to June 30, 1921, plaintiff received nothing from the United States as commutation for quarters, heat, and light on account of himself or his dependents.

VII. If plaintiff is entitled to commutation of quarters, heat, and light on account of his dependents during the period July 5, 1919, to June 30, 1921, there would be due him the sum of $1,602.87.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff, while serving as a lieutenant on active duty in the United States Navy at the navy yard in Philadelphia, was, on May 24, 1919, ordered to report to the commandant of the naval station, Olongapo, P. I., for such duty as might be assigned him, and he complied with the order. During the period of assignment, his wife and one child were maintained by him in a house in Philadelphia. Plaintiff occupied public quarters at Olongapo from August 21, 1919, to July 10, 1920, when on orders from the commandant at that place he was relieved from duty and assigned to Cavite, P. I. On arrival at the latter place plaintiff applied for public quarters, but none was available. He remained at Cavite until June 30, 1921, and during the period of his residence there he lived and subsisted on board the United States receiving ship *Mohican*.

Plaintiff in his brief states the question at issue as follows: "If the claimant in this case was 'on duty in the

field,' he is entitled to the commutation claimed herein. If he was not on duty in the field, he has no case." Plaintiff, to establish that he was on duty in the field, relies upon the opinion of the Secretary of the Navy, dated January 3, 1921, given to the Auditor for the Navy Department, as follows:

"This department is of the opinion that officers of the Navy who are on duty in the Philippine Islands are on duty in the field within the meaning of the act of 16 April, 1918."

The act relied upon by the plaitiff, named in his petition, as required by the rules of this court, is the act of April 16, 1918, 40 Stat. 530.[2]

The plaintiff would not be entitled to commutation of quarters in his own right under the act of March 2, 1907, 34 Stat. 1168, 1169, if he occupied public quarters during the time he was stationed in the Philippine Islands. *Irwin* v. *United States*, 38 C. Cls. 87, and *Samuel Smith* v. *United States*, 62 C. Cls. 23. The act of April 16, 1918, was extended to the Navy and Marine Corps by the joint resolution of Congress of December 24, 1919, 41 Stat. 384, "during the present emergency." Under the latter act, an officer who is on duty in the field or on active duty without the territorial jurisdiction of the United States and maintains a place of abode for dependents shall be furnished at the place where he maintains such place of abode, without regard to the personal quarters furnished him elsewhere, the number of rooms prescribed by law, and if no quarters are available he shall be paid commutation thereof and for heat and light allowable by law where quarters are not available.

[2] That during the present emergency *every commissioned officer of the Army of the United States on duty in the field, or on active duty without the territorial jurisdiction of the United States*, who maintains a place of abode for a wife, child, or dependent parent, shall be furnished at the place where he maintains such place of abode, without regard to personal quarters furnished him elsewhere, the number of rooms prescribed by the act of March second, nineteen hundred and seven (Thirty-fourth Statutes, page eleven hundred and sixty-nine), to be occupied by, and only so long as occupied by, said wife, child, or dependent parent; and in case such quarters are not available every such commissioned officer shall be paid commutation thereof and commutation for heat and light at the rate authorized by law in cases where public quarters are not available; but nothing in this act shall be so construed as to reduce the allowances now authorized by law for any person in the Army.

Opinion of the Court

It is admitted that plaintiff was not on duty outside the territorial limits of the United States. To establish that he was on duty in the field plaintiff relies upon the said opinion of the Secretary of the Navy as conclusive. Plaintiff was on shore duty at a permanent station. This court held in the case of *Clark* v. *United States*, 60 C. Cls. 589, that an officer on duty at a permanent station was not on duty in the field. See also, to the same effect, *United States* v. *Dempsey*, 104 Fed. 197, and *Smith* v. *United States*, *supra*.

Under the authority of the act of May 31, 1924, 43 Stat. 250, the President was authorized to issue regulations in the matter of allowances for rental quarters under the act of June 10, 1922, 42 Stat. 627, which covered the case of an officer " while he was on field or sea duty." In the executive order, dated August 13, 1924, field duty is defined as " service, under orders with troops operating against an enemy, active or potential." " Field duty " and " duty in the field " may be taken to be synonymous, as each of the acts of Congress in which they are used dealt with the question of rental allowances. The plaintiff was stationed at a permanent post, and it seems clear that he did not come within the definition of " field duty " set out in the President's order, and he was not on duty in the field within the meaning of the decisions above cited. The letter of the Secretary of the Navy, relied upon by the plaintiff, is a mere expression of opinion, is not a regulation approved by the President, and has no more force and effect than an expression of opinion. In the case of *United States* v. *Symonds*, 120 U. S. 46, where the Secretary declared in orders that service on training ships was shore duty, the court held that the order of the Secretary of the Navy could not convert services from sea services into shore services if they were in fact performed when at sea, that an order or regulation issued even with the approval of the President must be consistent with the statutes, and that the Secretary of the Navy could not diminish an officer's compensation, as established by law, by declaring that he was performing shore duty when, as a matter of fact, he was performing sea duty, or increase his pay by saying that he was performing sea duty when he was actually performing shore duty.

The plaintiff was clearly not "on duty in the field" during the time he was stationed at a permanent shore station. The petition should be dismissed, and it is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

NEVADA-CALIFORNIA-OREGON RAILWAY v. THE UNITED STATES

[No. D-42. Decided February 27, 1928]

On the Proofs

Eminent domain; Federal control act; absence of actual taking.—See *Marion & Rye Valley Ry. Co.* v. *United States*, 60 C. Cls. 230; 270 U. S. 280.

The Reporter's statement of the case:

Mr. George H. Parker for the plaintiff. *Mr. Milton C. Elliott* was on the brief.

Messrs. Louis R. Mehlinger and *Sidney F. Andrews*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Perry W. Howard* was on the brief.

The court made special findings of fact, as follows:

I. On December 28, 1917, plaintiff was a common carrier of passengers and freight for hire, and owned and operated a three-foot narrow-gauge steam railroad.

Prior to June 30, 1917, plaintiff's railroad lines consisted of 235 miles of main line extending from Reno, Nevada, to Hackstaff, California, and from the latter point to Lakeview, Oregon, together with a branch line about 40 miles in length, constructed through the Feather River Canyon. That portion of the main line which extends from Reno to Hackstaff, a distance of 64 miles, together with the branch line running through the Feather River Canyon, was sold to the Western Pacific Railroad Company, title passing in June, 1917; plaintiff continuing to operate same under a contract by which it was to continue such operation until the West-

ern Pacific Railroad Company had completed the work of standardizing the roadway and track of the lines so sold, and assuming the entire expense of such operation and retaining the profits thereof, if any.

The Western Pacific Railroad Company took over the actual physical operation of the lines so sold on January 29, 1918. Plaintiff retained the ownership of and operated the line extending from Hackstaff, California, to Lakeview, Oregon, about 171 miles of main-line track. Prior to the sale of a portion of its lines, plaintiff connected with the Southern Pacific Railroad at Reno, Nevada, and Wendel, California, with the Western Pacific at Wendel, California, following said sale with the Southern Pacific at Wendel, California, and with the Western Pacific at Hackstaff, California.

The plaintiff is the sole owner of the claim here involved and has made no assignment thereof.

II. Under authority of the act of Congress, approved August 29, 1916 (39 Stat. 645), the President of the United States, on December 28, 1917, issued a proclamation published on page 6, Bulletin No. 4 (revised), Public Acts and Proclamations by the President relating to the United States Railroad Administration, and general orders and circulars issued by the Director General of Railroads, and by reference made part of this finding.

III. Plaintiff received from said Director General the following letters, dated December 28, 1917, and January 8, 1918:

"Having assumed the duties imposed upon me by, and in pursuance of, the proclamation of the President dated December 26, 1917, you will, until otherwise ordered, continue the operation of your road in conformity with said proclamation. You are requested to make every possible effort to increase efficiency and to move traffic by the most convenient and expeditious routes.

"I confidently count on your hearty cooperation. It is only through united effort, unselfish service, and effective work that this war can be won and America's future be secured."

"The Government of the United States having assumed possession and control of the railroads for the period of the present war with Germany, it becomes more than ever obli-

gatory upon every officer and employee of the railroads to apply himself with unreserved energy and unquestioned loyalty to his work.

"The supreme interests of the Nation have compelled the drafting of a great army of our best young men, and sending them to the bloody fields of France to fight for the lives and liberties of those who stay at home. The sacrifices we are exacting of these noble American boys call to us who stay at home with an irresistible appeal to support them with our most unselfish labor and effort in the work we must do at home, if our armies are to save America from the serious dangers that confront her. Upon the railroads rest a grave responsibility for the success of the war. The railroads can not be efficiently operated without the whole-hearted and loyal support of everyone in the service, from the highest to the lowest.

"I earnestly appeal to you to apply yourselves with new devotion and energy to your work, to keep trâins moving on schedule time, and to meet the demands upon the transportation lines, so that our soldiers and sailors may want for nothing which will enable them to fight the enemy to a standstill and win a glorious victory for united America.

"Every railroad officer and employee is now, in effect, in the service of the United States, and every officer and employee is just as important a factor in winning the war as the men in uniform, who are fighting in the trenches.

"I am giving careful consideration to the problems of the railroad employees, and every effort will be made to deal with these problems justly and fairly and at the earliest possible moment. There should be a new incentive to everyone in railroad service, while under Government direction, to acquit himself with honor and credit to himself, and to the country."

IV. Plaintiff received general orders from the Director General of Railroads, to wit:

General Orders Nos. 1, 2, 3, 4, 5, 6, and supplement to No. 6; General Orders Nos. 8, 9, 10, 11, 12, and supplement to No. 12; General Orders Nos. 13, 14, 15, 16, 17, 18, 18–a, 19, 20, 22, 24, 25, 25–a, 26, 28, and supplement to No. 28; General Orders Nos. 30 and 31, all of which are published on pp. 141 to 310 of said Bulletin No. 4 (revised), and by reference made part of this finding.

Plaintiff complied with some of these orders. The evidence fails to show what, if any, compliance plaintiff made

with General Orders 4, 5, supplement to 6; 13, 15, 16, 17, 18-a, 19, 22, 24, 25, 25-a, supplement to 28; 30, and 31. Certain questionnaires were received by plaintiff relative to crossties, which were replied to; also certain circulars from the regional director relative to selling scrap iron and scrap material; circular 99 relative to classification of employees; this latter was replied to. Certain other questionnaires were answered.

V. Plaintiff also received the following request:

INTERSTATE COMMERCE COMMISSION,
Washington, January 5, 1918.

To the President of Nevada-California-Oregon Ry. Company.

DEAR SIR: By direction of the Director General of Railroads you will let me have by not later than January 15th, the following information:

First. A statement showing the amount of capital your company will require to raise during the calendar year 1918, and also separately for the first six months of that calendar year—

1. To meet all maturing bonds and note issues which have not already been provided for, or which are not to be paid out of the cash resources of your company, showing dates of such maturities.

2. To pay for improvement, betterment, and construction work already contracted for and partially finished (this statement should show what portion, if any, of such work can be stopped now without detriment).

3. An approximate estimate of the capital which may be imperatively important to provide for other construction work, improvements, and betterments, including additional terminals and new equipment (showing equipment separately).

4. An approximate estimate of the capital which, in the judgment of the management of your company, it is desirable to provide for the above purposes, but for which the demand is not absolutely necessary for the protection of the property or for the maintenance of its earnings.

Second. A statement as to the character of stocks, bonds, or notes with which your company expects to be able to raise the capital so required.

Reporter's Statement of the Case

The above information is to be immediately transmitted and may be supplemented later with such additions as become only later available.

Very truly yours,

W. M. DANIELS,
Commissioner.

Plaintiff furnished information, as follows:

JANUARY, 17, 1918.

Mr. W. M. DANIELS,
Commissioner, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR: Your request of the 5th calling for certain financial data to be returned not later than the 15th just received to-day. The following is the desired information from this company:

I.—1. None.

2. $50,000.00 to complete terminals now under construction at Alturas, Calif., brought about by sale of part of the line including present terminals.

3. Engine house and tracks, Lakeview, Oreg., $2,000.00; engine house and tracks, Hackstaff, Calif., $3,000.00; oil-storage reservoir, Amedee, Calif., $2,000.00; total, $7,000.00.

The above expenditure necessary, account having to move from our present terminals. See answer to question 2.

4. All work necessary for proper protection of property.

II.—1. Capital required as above to be raised from the sale of first mortgage, 6% gold bonds, authority for which has been given by the California Railroad Commission in the amount of $125,000.00, $75,000.00 of which has been sold, and proceeds applied on work already completed.

VI. On or about July 4th plaintiff received from John Barton Payne, general counsel for the Director General of Railroads, the following letter, to wit:

UNITED STATES RAILROAD ADMINISTRATION,
W. G. MCADOO, DIRECTOR GENERAL,
INTERSTATE COMMERCE BUILDING,
Washington, June 29, 1918.

(Division of Law: John Barton Payne, general counsel)

DEAR SIR: Pursuant to the recommendation of the regional director, the Nevada-California-Oregon Railway is relinquished from Federal control.

It will be the policy of the Railroad Administration to cooperate with relinquished roads as to a fair division of

joint rates, car supply, and, as far as may be consistent with the national needs, that there be no undue discrimination as to routing.

If you feel that hardship may result from relinquishment and desire to make a contract on fair terms, right is reserved to consider the advisability of making such a contract.

Very truly yours,

JOHN BARTON PAYNE.

Mr. CHARLES MORAN,
President Nevada-California-Oregon Railway,
68 William Street, New York, N. Y.

VII. Plaintiff presented its claim to the Interstate Commerce Commission, under section 204 of the transportation act, 1920, in which the commission made an order as follows:

"The Nevada-California-Oregon Railway, a corporation of the State of Nevada, hereinafter termed the carrier, is a steam railway company which, during the Federal control period, engaged as a common carrier in general transportation, operating between Hackstaff, Calif., and Lakeview, Oreg., a distance of approximately 171 miles, its line connecting at Wendel, Calif., with the line of the Southern Pacific Company, and at Hackstaff, Calif., with that of the Western Pacific Railroad Company, lines of railway or systems of transportation under Federal control. It sustained a deficit in its railway operating income while under private operation in the Federal control period. It is therefore a carrier within the meaning of paragraph (a) of section 204 of the transportation act, 1920.

"The carrier was under Federal control from January 1, 1918, to June 30, 1918, inclusive, and is subject to the provisions of section 204 for the period from July 1, 1918, to February 29, 1920, inclusive. * * *" (71 I. C. C. 548.)

VIII. It is agreed that the allegations in paragraphs 1, 2, 3, 5, 9, and 13 of the plaintiff's petition filed herein shall be taken as true.

IX. Plaintiff filed with the Director General of Railroads a claim for just compensation for the alleged use and occupation of its railroad under the provisions of the Federal control act (40 Stat. 453, 454). The Director General declined to pay the whole or any part of the amount claimed, and no part of the said claim for just compensation has been paid to the plaintiff.

Upon the refusal of the Director General to pay the said claim, plaintiff applied to the Interstate Commerce Com-

mission for the appointment of a board of referees authorized by section 3 of the Federal control act (40 Stat. 454). The board made a report, a copy of which is an exhibit to the petition herein.

X. It was ascertained that plaintiff's net railway operating income for each of the years of the test period—that is, the three years of 1915, 1916, and 1917—including the full earnings for the entire line for the month of January in each of said years, but for the remaining months of those years including only the net railway operating income as applicable to the 171 miles retained by plaintiff, after allocating and apportioning operating revenues and expenses to and between that part of the line sold and that part retained, is as follows:

1915 (deficit)	$2, 807. 17
1916	40, 363. 70
1917	69, 669. 20
Total	107, 225. 73
Annual average	35, 741. 91
Semiannual average	17, 870. 96

XI. The net railway operating loss of plaintiff's railroad during the period January 1 to June 30, 1918, was $26,305.44, such amount having been determined in accordance with the accounting classifications of the Interstate Commerce Commission, and being in consonance with the term "standard return" used to describe the average net railway operating income for the three years ended June 30, 1917.

It was ascertained that the average annual net railway operating income for the 275 miles of line for the three years ended June 30, 1917, was $16,530.96.

XII. Plaintiff's freight tonnage was not dependent upon the continued operations of any one industry, but was diversified between livestock and miscellaneous commodities.

XIII. Plaintiff's railroad is and for many years has been a party to through rates in connection with other railroads, and has received as its revenue amounts based upon divisions of such rates, which have been the subject of agreement between plaintiff and its connecting railroads.

In connection with the sale of the portion of its line to the Western Pacific Railroad, elsewhere referred to, plaintiff made a contract, running for fifteen years from April, 1917, whereby the plaintiff was to receive the same divisions which it had theretofore enjoyed based on the Reno haul, in respect to movements of traffic to be interchanged at Hackstaff with the Western Pacific, which compelled the Southern Pacific to meet the Hackstaff divisions at Wendel (i. e., grant the same divisions of the through rate on traffic moving via Wendel as the Western Pacific contract provided for with reference to the traffic via Hackstaff), which plan of interchange occasioned, as to plaintiff, a haul some 65 miles less in the case of the interchange at Reno and 40 miles less in the case of the interchange at Hackstaff.

XIV. Plaintiff was never ousted from the actual possession and control in the operation of its railroad throughout the period in question but continued to operate the same as it had done before the issuance of said proclamation or orders and without change in the manner, method, or purpose of operation. During the period in question it did not serve any military camp nor transport troops or munitions. The character of the traffic remained the same as prior thereto.

During said period plaintiff retained its earnings and expended the same and made no accounting therefor to the Government.

The court decided that plaintiff was not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This is an action by the Nevada-California-Oregon Railway to recover just compensation for the alleged taking of its railroad by the Government. The taking is based upon the proclamation by the President issued December 28, 1917, under the provisions of the general defense act, 39 Stat. 619, 645. The allegation is that the road was taken and kept under Federal control for the period between January 1 to June 29, 1918. The petition prays that this court " de-

termine the amount of such just compensation as provided by said section 3 of the Federal control act," 40 Stat. 454.

The facts show that the plaintiff was a common carrier of passengers and freight and owned certain lines of railway consisting of 235 miles of main line extending from Reno, Nevada, to Hackstaff, California, and thence to Lakeview, Oregon, and also a branch line of about 40 miles through the Feather River Canyon. That part of the main line extending from Reno to Hackstaff, a distance of 64 miles, and the branch line of 40 miles had been sold in June, 1917, to the Western Pacific Railroad Company, but under the terms of a contract between plaintiff and the purchaser the former was to continue the operation of the line and branch, sold as stated, until certain work on them had been completed by the purchaser, and to assume the entire expense of such operation and retain the revenues therefrom. The purchaser took over the physical operation of these lines on January 29, 1918. The line of railroad, therefore, which the plaintiff corporation owned on January 1, 1918, was a three-foot narrow-gauge railroad extending from Hackstaff, California, to Lakeview, Oregon, consisting of about 171 miles of main-line track.

The plaintiff received the letters sent out by the Director General of Railroads under dates of December 28, 1917, and January 8, 1918. It also received other letters and questionnaires and complied with some of these, and it received a letter from the general counsel of the Director General dated June 29, 1918, addressed to its president in New York, and stating that this road was relinquished from Federal control. The facts also establish that plaintiff company was never ousted from the actual possession of its road throughout the period in question, but continued to operate the same exactly as it had done before the issuance of the President's proclamation and without change in the manner, method, or purpose of operation. The general character of its traffic remained the same as before, and it did not serve any military camp, nor did it transport troops or munitions. During the six months in question it received all earnings of the railroad and expended the same without interference. It did not

account to the Government or to any agency of the Government for its earnings or its disposition of them.

In these circumstances, the case is not substantially different from that of *Marion & Rye Valley Railway Co.*, 270 U. S. 280. This court was of opinion that the alleged taking of that road was not sustained by the proof, though it appeared that the company had received a number of the Director General's orders and a final order relinquishing it from Federal control. The opinion of the Supreme Court says (p. 282): "We have no occasion to determine whether in law the President took possession and assumed control of the Marion & Rye Valley Railway. For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company and it was not subjected by the Government to pecuniary loss." The most that can be said of the effect of the proclamation and orders upon plaintiff or its road is that they amounted to a technical taking under Federal control. The Government was certainly not in actual possession. No accounting was made of its income. Its operation was by its officers. There is renewed here a contention that was made in the *Marion & Rye Valley case, supra*, upon the effect of section 1 of the Federal control act. But that act merely authorized the President to enter into an agreement to pay as much as the so-called "standard return." It did not direct him to pay anything in the absence of an authorized agreement. The President could refuse to pay as much as the "standard return" and the road was left free to reject any offer that might be made. *Marion & Rye Valley case*, p. 284. The provision did not establish a rule of compensation. *Ib.* The act provides that where no agreement is reached the carrier is relegated to section 3 of the Federal control act providing a method for ascertaining just compensation and the claim here asserted is in one phase of it based upon the action of the board of referees provided for in section 3. But "the fact that the right to recover compensation is a statutory one did not relieve the railroad from the burden of proving the value of the use taken from the company or the damage suffered by

it under rules ordinarily applicable to takings by eminent domain." *Marion & Rye Valley case*, *supra*, p. 285. The report of the referees is attached to the petition and it is subject to the criticism applied in the case just cited. The petition avers and the report confirms the allegation, "that compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the Government and agreement to pay the fair rental therefor."

This method was rejected in the *Marion & Rye Valley case*. The board reported that a stated sum was just compensation to plaintiff on account of the Government's "failure to return the property in as good repair and complete equipment as it was at the commencement of Federal control," but this finding of the board is made "subject to such accounting adjustments as may be finally determined proper" under certain accounting rules of the Interstate Commerce Commission. The board also, subject to the same accounting rules, reported that there was a stated operating deficit during the period in question, and concluded that "the obligation of the Government to assume any net railway operating deficit that might be incurred during the operation of plaintiff's property and to return plaintiff's property in as good repair and complete equipment as it was in at the commencement of Federal control was, and is, just compensation to the plaintiff for the aforesaid use of its property during the said period of Federal control and the preservation thereof." The amounts thus ascertained were $26,305.44 "operating deficit" and $14,546.92 on account of depreciation. Claiming these items, the petition also claims additional sums. The statute, section 3, provides that the report of the referees shall be *prima facie* evidence of the amount of just compensation and of the facts therein stated. This is not to say that the conclusions of the board, based upon an erroneous view of the elements making up just compensation, are controlling or, indeed, have any effect. The amount ascertained as operating deficit and the amount ascertained as depreciation may be correct, but the conclusion that these constitute parts of the just compensation to which the company may be entitled is clearly erroneous. With the effect of these items, if an agreement such as is

authorized by section 1 of the Federal control act were made, we have nothing to do. The agreement was not made. Failing that agreement, the company's recourse was to section 3; which authorizes the board of referees to act, and also authorizes an agreement by the President with the carrier that may include provisions similar to those mentioned in section 1.

It is upon the failure to have the agreement authorized by section 3 that the company may come to this court. Except in the particulars above stated, the board finds the evidence insufficient to ascertain what just compensation should be awarded. This condition is not relieved by the evidence adduced in this court. The two items mentioned were before the court in the *Marion & Rye Valley case*, 60 C. Cls. 230, 248. It is true here, as it was in that case, that "No evidence was introduced before it to show that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value, although the hearing before the board was commenced long after the period of alleged possession and control had expired." 270 U. S. 286. On the other hand, it does appear that the company uniformly had an operating deficit for the first six months of each year because it was what was called "a seasonal road," its principal earnings being during the last half of the year, when the cattle and wool moved. During the first six months of the three-year "test period" the company invariably had a deficit. There is no proof that any order of the Director General or its observance added anything to the company's loss or that the alleged "undermaintenance" was induced or affected by his orders. That the cost of labor and of materials may have increased is quite likely owing to the general increases arising out of war conditions. As already stated, the question before us is whether the plaintiff's property was taken; and if so, the just compensation it is entitled to receive. There can not be a judgment for nominal damages. *Grant case*, 7 Wall. 331, 338. No recoverable loss or damage is shown. The petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

HEID BROTHERS, INC., v. THE UNITED STATES

[No. F-126. Decided March 5, 1928]

On the Proofs

Counterclaim; requirement of proof; purchase of coal; test of samples; failure to comply with contract in taking samples; payment of full contract price.—In seeking recovery against a plaintiff in the Court of Claims by way of counterclaim, the Government must establish its right to recover by proper and sufficient evidence, and where a contract to furnish the Government coal required the same to be of certain standard, the test to be made from samples, collected and prepared, if the contractor so elected, in his presence, and the evidence is that the contractor was given no notice or opportunity to be present when the samples were taken, and was not notified that any samples had been taken until a year after the Government had accepted the coal and paid therefor the price payable for coal up to standard, the Government can not recover the difference in price provided for in the contract for coal below the standard fixed.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized under the laws of the State of Texas and has been continuously for a period antedating the dates of the transactions involved in this case engaged in the forage and fuel business, having its principal place of business at El Paso, Texas.

II. On June 20, 1917, the United States, represented by Captain S. B. Belden, Quartermaster Corps, U. S. A., entered into a contract with the plaintiff to furnish bituminous coal f. o. b. cars at Fort Huachuca, Arizona, from July 1, 1917, to June 30, 1918, and for all coal delivered during July, August, and September, 1917, the plaintiff was to receive $14 a ton of 2,000 pounds, and for all coal delivered

during the balance of the fiscal year ending June 30, 1918, $15.50 a ton of 2,000 pounds.

III. The specifications and proposals for coal for the Army stations in the United States, prepared in the office of the Quartermaster General, U. S. Army, Washington, D. C., February, 1916, attached to and made a part of the contract of June 20, 1917, provided in part as follows:

"23. *Contractor privileged to be present.*—The contractor shall have the privilege of having a representative present to witness the collection and preparation of the samples to be forwarded to the laboratory.

* * * * *

"25. *Laboratory and method.*—The samples shall be immediately forwarded to the Bureau of Mines, Department of the Interior, Washington, D. C., and they shall be analyzed and tested in accordance with the method recommended by the American Chemical Society and by the use of a bomb calorimeter. Such analyses and tests shall be made at no cost to the contractor. The result shall be reported by the Bureau of Mines to the post quartermaster in not more than fifteen (15) days after the receipt of the sample—if more than one sample is received from the same delivery, the fifteen (15) days shall date from the receipt of the last sample taken.

* * * * *

"35. *Determination of price.*—The Government hereby agrees to pay the contractor within 30 days after the completion of an order or delivery for each ton of 2,000 pounds of coal delivered and accepted in accordance with all the terms of this contract the price per ton determined by taking the analysis of the sample, or the average of the analysis of the samples if more than one sample is analyzed, collected from the coal delivered upon the basis of the price herein named, adjusted as follows for variations in heating value, ash, and moisture from the standards guaranteed herein by the contractor (see paragraph 13 in Appendix for exception to this method):

[Here follow provisions for adjustments.]

* * * * *

"44. Payment shall be made within thirty (30) days after the completion of an order and shall be based on the contract price, provided the coal is not subject to rejection."

Form A, which was attached to and made a part of the specifications and proposals and which formed a part of

the contract, required that the coal to be furnished by the plaintiff for the use of the Government at Fort Huachuca, Arizona, should be of a standard equal to 13,500 B. t. u.'s. (British thermal units).

IV. During the months of July, August, and September, 1917, the plaintiff delivered to the defendant at Fort Huachuca, Arizona, 899.8 tons of coal at the contract price of $14 a ton, a sample of which was forwarded by the quartermaster at Fort Huachuca, Arizona, to the Bureau of Mines, Washington, D. C., for an analysis under the provisions of the contract. The sample was analyzed by the Bureau of Mines and a copy of its report showing the analysis was transmitted to the quartermaster at Fort Huachuca, Arizona, on October 31, 1917, but it was not received by that officer. On September 20, 1917, the plaintiff was paid therefor the sum of $12,597.20. On September 24, 1918, pursuant to a request contained in a letter of September 19, 1918, Van H. Manning, Director, Bureau of Mines, Washington, D. C., forwarded to the depot quartermaster, El Paso, Texas, a duplicate report of the analysis of October 31, 1917, which analysis disclosed that the coal delivered by the plaintiff only contained 12,490 B. t. u.'s. On September 30, 1918, the depot quartermaster, El Paso, Texas, advised the plaintiff that the coal so delivered contained 12,490 B. t. u.'s only instead of 13,500 as required by the contract; that on September 20, 1918, it had been paid, by check No. 10,645, $14 a ton for the 899.8 tons of coal delivered at Fort Huachuca, Arizona; that due to the difference in B. t. u.'s this was an overpayment of $1.39 a ton on 899.8 tons, or $1,250.72, and requested the plaintiff to remit accordingly, which the plaintiff refused to do. The quartermaster at El Paso, Texas, advised the Auditor for the War Department that the plaintiff had been overpaid $1,250.72 under the contract of June 20, 1917.

The plaintiff was not given notice or opportunity to be present when the said samples were taken, and was not notified that any samples had been taken until a year after the said coal was accepted and paid for by the defendant.

V. On March 20, 1918, the plaintiff entered into contract No. 107 with the defendant for furnishing alfalfa hay for

delivery at Fort Bliss, Texas. The plaintiff delivered all of the hay called for under said contract, which was accepted and used by the defendant. Under this contract the plaintiff was paid all of its claim except $1,398.97. By settlement certificate No. 110,961, dated May 20, 1921, the sum of $1,250.72, claimed by the defendant to be owing to it as an overpayment made under the contract of June 20, 1917, was deducted from the above sum, leaving a balance of $148.25, for which amount Treasury Warrant No. 56,399 was transmitted to the plaintiff. This Treasury warrant the plaintiff still holds but refuses to cash.

The court decided that plaintiff was entitled to recover $1,250.72.

MOSS, *Judge*, delivered the opinion of the court:

During the months of July, August, and September, 1917, plaintiff, Heid Brothers, delivered to the defendant under a contract dated June 20, 1917, 899.8 tons of coal at the price of $14 per ton, and on September 20, 1917, plaintiff was paid therefor the full contract price. Thereafter plaintiff was advised by letter from the War Department, dated September 30, 1918, that the quality of the coal furnished did not meet the standard of requirement provided in the contract, and plaintiff was requested to remit the sum of $1,250.72, as the difference in price between the coal furnished and that provided for in the specifications. Plaintiff refused to comply with this request, and thereafter defendant deducted said sum from amounts due plaintiff under a contract for the delivery of alfalfa hay, and still retains same. This suit is for the recovery of said sum.

The contract herein provided that payment should be made within 30 days after the completion of an order, "provided the coal is not subject to rejection." The delivery of the coal in this case was completed sometime in the month of September, 1917, the exact date not disclosed, and full payment was made on September 20, 1917. The coal was consumed by the Government, and plaintiff received no intimation of any defect in the quality of same until September 30, 1918, more than a year after the delivery and payment.

Syllabus

The specifications and proposal for furnishing this coal to the Government, made a part of the contract, contained the following provision: "The contractor shall have the privilege of having a representative present to witness the collection and preparation of the samples to be forwarded to the laboratory." The contract provided elaborate specifications for the collection and preparation of samples, twelve specific directions being set forth in detail. Plaintiff is suing for the balance due on the hay contract, amounting to $1,250.72, to which there is no defense. In seeking a recovery against plaintiff, the Government has the burden of establishing by proper and sufficient evidence its right of recovery, and it has failed to do so. Plaintiff was given no opportunity to have a representative present when the samples were collected and prepared, and no evidence was offered to prove that the samples used in the analysis were taken in accordance with the provisions of the contract. The coal was delivered and paid for, and was consumed by the Government, and the Government sustained no damage whatever by reason of the alleged slight deviation from the specifications in the ash content of the coal. Defendant's claim is without merit. Its contention is inequitable and unfair, and plaintiff is entitled to recover, and it is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

WALTER L. PRICE v. THE UNITED STATES[1]

[No. D-883. Decided March 5, 1928]

On the Proofs

Jurisdiction; clerk, conference minority, House of Representatives; continuance as clerk after expiration of Congress; construction of House rules.—The act of May 29, 1920, appropriated a certain amount for expenditure by the conference minority of the House of Representatives for the services of a clerk, and did not create a Federal office. Whether one selected to perform those services continues as an assistant to the conference

[1] Certiorari denied.

minority after Congress has expired by limitation of law, is to be determined solely by the rules of the House which under the circumstances the Court of Claims has no jurisdiction to construe or interpret.

The Reporter's statement of the case:

Mr. John F. McCarron for the plaintiff.

Mr. John H. Small for the intervenor.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a citizen of the State of Indiana and of the United States.

II. On April 11, 1921, plaintiff, Walter L. Price, was appointed by Hon. Claude Kitchin, minority leader and chairman of the conference minority of the United States House of Representatives of the 67th Congress, clerk of the conference minority at a salary of $2,500 per year and bonus of $240 per annum, and on April 12, 1921, plaintiff took the oath of office and assumed the duties of said position.

III. Hon. Claude Kitchin, minority leader and chairman of the conference minority of the United States House of Representatives of the 67th Congress, derived his authority for making such appointment of plaintiff to the position heretofore stated from the Democratic Members of the House of Representatives of the 67th Congress in caucus assembled under date of April 9, 1921, and said Members were known as the minority of the House of Representatives of the 67th Congress, and also from the act of Congress, Public, No. 231, 66th Congress, approved May 29, 1920. The particular section of such act giving said authority is:

"Conference minority: Clerk, $2,500; assistant clerk, $1,500; janitor, $1,000; in all, $5,000; the same to be appointed by the chairman of the conference minority."

The amount of salary for the position of clerk to the conference minority is made annually in the legislative branch appropriation act, and for the year ending June 30, 1921, it is found in Public, No. 231, 66th Congress, approved May 29, 1920, and succeeding Congresses.

IV. Plaintiff, without further appointment from Hon. Claude Kitchin, minority leader and chairman of the conference minority during the period of the 67th Congress, or without taking any further oath of office during said period, continued to discharge the duties of the position of clerk to the conference minority from April 11, 1921, to December 3, 1923, and was paid salary at the rate of $2,500 per annum and bonus of $240 per annum for the period from April 11, 1921, up to and including May 31, 1923.

V. Under date of June 1, 1923, William Tyler Page, Clerk of the United States House of Representatives, made an alleged appointment of Charles H. England to the position of clerk to the conference minority. Plaintiff protested said alleged appointment in writing to the said Clerk of the United States House of Representatives, but to no avail, and has repeatedly demanded of said Clerk of the House of Representatives the salary due and owing him.

VI. On March 4, 1923, the 67th Congress expired by limitation of law.

VII. On April 17, 1924, plaintiff appealed in writing to the Comptroller General of the United States for the amount of salary due him, amounting to $1,385.22, for the period from May 31, 1923, to December 3, 1923. The Comptroller General on October 29, 1924, denied the claim and stated in his decision the following:

"The facts appearing do not establish that your appointment on April 11, 1921, was an appointment 'by the chairman of the conference minority,' as was expressly required by the terms of the appropriation; but even if it could be established that your appointment was in accordance with the statute, the only authority for the payment of salary for the office or position of clerk, conference minority, for the fiscal years 1923 and 1924, which are the fiscal years involved in your claim, was the provision hereinbefore quoted making a specific appropriation therefor, and these appropriations must be understood to be appropriations for pay for services rendered and as available only for payments to persons actually in possession of the office or position appropriated for as distinguished from persons having only a legal right to such office or position."

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

Plaintiff's case depends upon the following facts: April 11, 1921, plaintiff was appointed by the Hon. Claude Kitchin, minority leader and chairman of the conference minority of the House of Representatives, as clerk of the conference minority, salary $2,500 per annum, and bonus of $240 per annum. On April 12, 1921, he took the oath of office and entered upon the performance of its duties. Plaintiff received the salary and bonus attached to the office from April 12, 1921, up to and including May 31, 1923. On June 1, 1923, William Tyler Page, Clerk of the House of Representatives, appointed Charles H. England to the position of clerk to the conference minority. Since that time, notwithstanding repeated protests and assertions of title to the office by him, the plaintiff has not received any compensation whatever which he alleges is due and unpaid. The claim is for $1,385.22, salary alleged to be due from May 31, 1923, to December 3, 1923. On May 24, 1926, Charles H. England was permitted to and did file an intervening petition, under which claim is made for the salary of the same office from July 1, 1923, to December 3, 1923, amounting in all to the sum of $1,157.22. Plaintiff's contention, as well as that of the intervenor, is predicated upon a section of the annual branch appropriation act, approved May 29, 1920, 41 Stat. 636, providing in terms as follows:

"Conference minority: Clerk, $2,500; assistant clerk, $1,500; janitor, $1,000; in all, $5,000; the same to be appointed by the chairman of the conference minority."

Under this section of the appropriation act the plaintiff asserts that he was duly appointed by the minority leader in Congress, who in turn derived his position and power to appoint from the Democratic Members of Congress in caucus assembled, and that no authority whatsoever resided in the Clerk of the House to either revoke his appointment or appoint another.

There is no doubt, of course, that the plaintiff was on the date he alleges duly appointed to the office he claims by the

minority leader, nor that he served until superseded by England's selection. Plaintiff's insistence is that when the Congress expired by law on March 4, 1923, the minority leader as such became *functus officio*, and hence England's appointment was not lawful, and the Clerk of the House was without authority in any event to make the selection. The vital question deducible from the facts stated is one of jurisdiction. Who is recognized by the minority party in Congress as minority leader is a matter of voluntary selection by those who constitute the minority. Obviously it is solely and peculiarly a political question with which the courts have nothing to do. True the political organization as thus established seeks assistants in the conduct of its affairs, and Congress by appropriating certain sums makes available to the organization the sums so appropriated to pay said assistants; but by so doing statutory offices of the Government are not created with fixed salaries, and the incumbent selected by the minority leader does not in any sense become an official of the United States. The sum of $2,500 is made available to the minority organization to pay a clerk. Nevertheless, the leader, if he so chooses, might engage an assistant of this character for a less sum without imposing upon the United States a monetary liability to pay the sum stated in the appropriation act. The plaintiff's misconception of his rights follows his treatment of the appropriation act as one creating an office and fixing an annual salary therefor. Such is not the case. The legislation simply makes available for expenditure the sums stated, and the leader of the minority is designated as the one authorized to make the expenditure up to the amount of the sums available for the purpose. Clearly the clerk to the minority leader is simply an assistant to a voluntary political organization, responsible alone to the organization, and subject to be displaced as the judgment of the leader dictates. Whether the leader of the minority became *functus officio* during a recess of Congress or subsequent to the expiration of a Congress is a matter for the minority organization to determine, not this court.

We need not indulge citation of authorities to sustain a proposition that no right to recover the salary of an office

prevails until the office is created, the salary fixed, appointment proved, and duties are performed. Aside from all that has been said, it is indisputably certain that where a matter is solely one governed and controlled by the rules of the House of Representatives, this court is without jurisdiction to interpret or construe them. Even so, it would bring about a most unusual situation to sustain a proposition that one selected as a clerk to the minority would be entitled to recover a judgment for an alleged fixed salary for a period of time during which the clerk himself asserts there existed no minority and no minority leader. Whether the clerk so selected continues in office during this time is one foreign to our jurisdiction under section 145 of the Judicial Code. The plaintiff's petition and the intervening petition will be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

FOURTH & CENTRAL TRUST COMPANY, OF CINCINNATI, OHIO, SOLE SURVIVING EXECUTOR OF THE ESTATE OF JAMES E. MOONEY, v. THE UNITED STATES

[No. F-92. Decided March 5, 1928]

On the Proofs

Income-tax return; omission to deduct accrued Federal estate-transfer tax; extension of time with interest; payment in subsequent taxable year.—Where the executor of an estate did not charge or credit the amount of a Federal estate-transfer tax on his books during the year in which it was due and payable, but entered it when it was finally paid in a subsequent year, he was not entitled, for the purpose of calculating the taxable income of the estate, to a deduction of the estate tax in the year in which it was originally due and payable, notwithstanding he was granted an extension of time for paying the estate tax on condition that it should bear interest until paid.

The Reporter's statement of the case:

Messrs. Robert R. Miller and *Samuel C. Williams* for the plaintiff. *Miller & Winston* were on the brief.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. James E. Mooney, a citizen of the United States, died on September 15, 1919, leaving a last will and testament. The Fourth & Central Trust Company of Cincinnati, Ohio (the corporate successor of and identical legal entity with the Central Trust Company, the name of the Central Trust Company having been changed to the Fourth & Central Trust Company), and Mr. Charles A. Gordon, of Cincinnati, Ohio, were appointed coexecutors under the will of said decedent. The executors qualified and letters testamentary were duly issued on September 27, 1919. Mr. Charles A. Gordon died before this suit was commenced, leaving plaintiff as sole executor of said estate.

II. On March 14, 1921, the executors filed the estate's income-tax return for the year 1920 on Form No. 1040. The net income returned amounted to $169,889.86, upon which a tax was assessed of $60,657.21, which tax was duly paid. An estate tax amounting to $341,371.47 was due and payable upon said estate on September 15, 1920. Said estate tax was not deducted from the return made by the executors on March 14, 1921, and was not charged on the books of the executors for that year. Prior to the date when payment of said estate tax was due the executors of said estate applied to the Commissioner of Internal Revenue for, and received an extension of, one year's time in which to pay said tax, said extension being granted upon the condition that said tax should bear interest at the rate of six per cent per annum until paid. The sum of $123,800.26 was paid by the executors upon the estate tax on date of extension, and a further extension granted for the balance, $229,590.31. The total balance was paid in 1922, the total accumulated interest paid amounting to $12,019.10, the taxpayer finally paying a total tax of $353,390.57.

III. The executors did not deduct the estate tax from the income of the estate for 1920 because the Commissioner of Internal Revenue had refused to allow deductions of this

character and the rulings and regulations of the bureau forbade such deductions. On August 4, 1922, plaintiff filed a refund claim asking for the refund of the full amount of the income tax, viz, $60,657.21, paid in 1920, as per return for that year, basing the refund claim upon a claimed deduction of the amount of the estate tax due in 1920, citing section 214 of the revenue of 1918.

IV. The Commissioner of Internal Revenue, through a special agent of the bureau, caused an audit of decedent's estate to be made for the years 1919, 1920, 1921, and 1922. The special agent making the audit first examined the books of the plaintiff. Plaintiff's books did not reflect all of the income of the estate received during this time, nor did they disclose all the disbursements made. Recourse was therefore had to the books of Mr. Charles A. Gordon, coexecutor and formerly private secretary to Mr. Mooney, the decedent. How and in what manner Mr. Gordon's books were kept is not satisfactorily shown. It was impossible to make up a correct and verified return by the special agent from an examination of the books of the plaintiff, and Mr. Gordon, the special agent, through correspondence conducted by the plaintiff, at his request, procured from superintendents of ranches in California certain inventories upon which in part his report was made, and in addition to this examined the books of the Oak Leather Company, a corporation in which both the decedent and Mr. Gordon were interested, before he could make a final report. How the books of the Oak Leather Company and the superintendents of the California ranches were kept does not appear. The special agent making the examination and report had had a limited experience in auditing work and was not a certified public accountant. No one set of books reflected the true income of the taxpayer.

V. The special agent's report of audit contained two errors, one allowing a deduction of the estate tax for the year 1921 and the other refusing to allow an item of $10,283.86 paid by plaintiff in discharge of certain delinquent taxes due in the years 1914 to 1919, inclusive, and paid by the executor in the year 1920.

VI. The plaintiff's books, as well as other records and accounts kept of the estate involved, did not disclose a

charge or credit of the amount of the estate tax for the year 1920, and it was not entered upon its books until payments were made.

VII. The deduction of $123,800.26 was allowed in the plaintiff's return for the year 1921, and a further deduction from the balance of the estate tax is allowable for the year 1922.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff is the sole surviving executor of the estate of James E. Mooney, deceased. Mr. Mooney died on September 15, 1919. His estate became liable for a Federal estate tax in the sum of $341,371.47. The plaintiff as executor of said estate filed the estate's income-tax return for 1920 on March 14, 1921. In stating gross income and allowable deductions therefrom the plaintiff did not deduct the amount of the estate tax. The reported net income for the year 1919–20 was $169,889.86, upon which a tax was assessed and paid of $60,657.21. If the item of $341,371.47, the estate tax, is deductible, the estate was not liable for the income tax of $60,651.21 paid, and it is for the recovery of this amount that this suit is brought. The estate tax is a deductible item under section 214 (a) (3) of the revenue act of 1918 (40 Stat. 1067). *United States* v. *Woodward*, 256 U. S. 632. The commissioner refused a refund claim for the amount of the income tax stated above, on the ground of the system employed by the plaintiff in keeping the estate's books of account, sustaining the right to do so on an alleged showing that the same had been kept on a cash and disbursements basis. This holding is supported by the decision of the Supreme Court in *United States* v. *Mitchell*, 271 U. S. 9. There is at least one pointed difference between the facts in the *Mitchell case* and the present one. The plaintiff in this case, prior to September 15, 1920, during the course of the administration of the estate, and before filing the estate's income-tax return, applied to the commissioner for an extension of time in which to pay the estate tax. The commissioner granted the application upon the condition that

interest must be paid upon the total amount of the tax due until it was paid. This was acceded to, the time of payment extended twice, and the accumulated interest duly paid. The commissioner declined to refund.

We think this case falls within the decision of the Supreme Court in the *Mitchell case*, *supra*, as the amount of the estate tax was not in fact charged against the estate upon the books of the plaintiff until the dates when it was paid and the commissioner allowed the deduction for the 1921 payment. Under this decision the plaintiff is entitled to the deduction for the 1922 payment. The extension of time within which to pay was a privilege to plaintiff; and while it paid interest upon the deferred payments, this fact alone does not seem to except the case from the decision of the Supreme Court in the *Mitchell case*. We believe the plaintiff is not entitled to recover. The petition will be dismissed. And it is so ordered.

GRAHAM, *Judge;* MOSS, *Judge;* and CAMPBELL, *Chief Justice*, concur.

ASIATIC PETROLEUM CO. (NEW YORK), LTD., v. THE UNITED STATES

[No. E-326. Decided April 2, 1928]

On the Proofs

Import duties, Philippine Islands; purchase of oil by Navy; delivery c. i. f. Cavite; sec. 15, act of August 5, 1909.—Where the printed form of a standard Navy contract provides that "customs duties * * * are included in the price," and the contractor will not be entitled to free entry or remission of duties, and the form is used for the purchase of fuel oil, but there is inserted therein typewritten matter specifying delivery "c. i. f. Cavite," the typewritten matter governs, and the contractor is not liable for any charges except cost, insurance, and freight. The import duties, if any, are payable under section 15 of the act of August 5, 1909, by the United States, consignee.

Semble, That the Philippine tariff act of August 5, 1909, did not require the United States to pay duty on oil owned by it and imported into the Philippine Islands for use in the Military or Naval Establishments.

The Reporter's statement of the case:

Mr. Frederick H. Wood for the plaintiff. *Mr. Cletus Keating* and *Cravath, Henderson & de Gersdorff* were on the briefs.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff herein, the Asiatic Petroleum Company (New York), Limited, is a corporation organized and existing under the laws of the State of New York, having its principal office and place of business at No. 65 Broadway, Borough of Manhattan, city and State of New York.

II. On May 7, 1923, the plaintiff company and the United States, acting through T. W. Leutz, Acting Paymaster General of the Navy, Chief of the Bureau of Supplies and Accounts, and duly qualified and acting, entered into contract No. 57684 for fuel oil for the use of the Navy. Said contract is attached as Exhibit A to the petition herein and is by reference made a part of this finding.

III. Under and in fulfilment of the terms of said contract No. 57684 the United States Navy Department, Bureau of Supplies and Accounts, issued its orders from time to time for deliveries under said contract.

IV. A statement of the deliveries of fuel oil made by plaintiff under said contract No. 57684 and the amounts paid by the defendant to plaintiff are set forth in Exhibit B to the petition herein, which is made a part of this finding by reference thereto. Said statement also contains the following facts:

(a) The place or point of delivery of each shipment of oil to the carrying steamer;

(b) The name of the ships by which the respective cargoes of oil were carried;

(c) The consignee named in the bill of lading for each shipment;

(d) The place at which, or the container into which, the oil was discharged by each ship upon arrival at Cavite;

(e) The date on which each cargo of oil was discharged from the carrying steamer at Cavite;

(f) The outturned quantity (i. e., the quantity discharged from the carrying steamer) of each cargo in tons of 2,240 pounds each at Cavite, and the total outturned quantities for all cargoes delivered by the plaintiff under the contract;

(g) The aggregate contract price for each cargo, and the total contract price for all cargoes, delivered by the plaintiff under the contract;

(h) The date or dates on which payment or payments were made by the defendant to the plaintiff at San Francisco in respect of each cargo delivered by the plaintiff under the contract;

(i) The amounts paid by the defendant to the plaintiff at San Francisco in respect of each cargo, and the total amount paid by the defendant to the plaintiff at San Francisco in respect of all cargoes, delivered by the plaintiff under the contract; and

(j) The amounts deducted and withheld by the defendant from the total contract price in respect of certain of the cargoes, and the total amounts deducted and withheld by the defendant from the total contract price in respect of all cargoes, delivered by the plaintiff under the contract.

V. The plaintiff has demanded payment from the defendant of the sum of $121,876.16 as the balance due on the contract and the defendant has refused to pay said amount and has disclaimed liability therefor.

VI. The plaintiff paid all freight charges of the carrying steamers from the point of loading to the place of discharge.

VII. The carrying steamers were each owned by parties other than the plaintiff.

VIII. Prepaid bills of lading signed by the master of the carrying steamer for the quantity of oil carried by his vessel were issued in the case of each cargo and delivered to and forwarded with the master of the carrying steamer for delivery to the consignee upon arrival at Cavite.

IX. A prepaid bill of lading for each cargo was delivered by the master of the carrying steamer or the agents of the plaintiff to the defendant's agents, the United States naval authorities at Cavite, as soon as practicable after arrival of the carrying steamer. The bill of lading was in

each case accepted by the naval authorities and the oil was delivered thereunder by the carrying steamer.

X. Each cargo of oil was insured by the plaintiff with Petroleum Assurantie Maatschappij of The Hague, Holland, "for account of the supplier or whom it may concern."

XI. No request was made by the United States naval authorities for the delivery to them of insurance policies or insurance certificates covering any of the cargoes and none was delivered to them by the plaintiff.

XII. On or about March 4, 1924, plaintiff referred a claim to the Comptroller General for an unpaid balance of $121,-876.16 due on the contract price of oil delivered pursuant to the terms of said contract, but no decision has been rendered thereon, though by letter addressed to the Secretary of the Navy dated June 25, 1924 (3 Comp. Gen. 988) the Comptroller General made a preliminary ruling adverse to the plaintiff, and thereafter by letter addressed to the Secretary of the Navy, dated August 18, 1924, affirmed his earlier ruling.

Except as above stated, no action has been had on said claim in Congress or by any of the departments of the United States.

XIII. On December 18, 1922, the plaintiff company and the United States, acting through the Paymaster General of the Navy, Chief of the Bureau of Supplies and Accounts, and duly qualified and acting, entered into contract No. 56924 for fuel oil for the use of the Navy, which contract is attached to the defendant's counterclaim as Exhibit A and made a part of this finding by reference.

XIV. The following statement shows the deliveries of fuel oil made by plaintiff under said contract No. 56924, as well as the names of the ships carrying same, dates discharged, bills of lading, number of tons of oil, where discharged, quantity billed by customs, etc.:

CONTRACT 56924

Record of deliveries and payments, Asiatic Petroleum Company

Steamer	Consigned to—	Date discharged	Bill of lading, quantity, tons	Place of discharge at Cavite	Quantity billed by customs	Amount of duty	Disbursing public bill number	Date paid	Quantity paid	Amount paid
		1923						1923		
Hermione	United States Navy, Cavite (P. I.)	Jan. 12	7,090.5946	U. S. S. Pecos			1046	Feb. 9	6,679.5	$68,464.88
Semiramis	United States Navy, Cavite (P. I.)	Jan. 24	7,914.8233	Naval shore tanks	7,914.8233	$19,852.64	1047	Feb. 9	7,860.00	80,565.00
Argonauta	United States Navy, Cavite (P. I.)	Feb. 3	7,285.3434	Naval shore tanks	3,213.007	8,161.04	1244	Feb. 16	7,191.00	73,707.75
Phorus	United States Navy, Cavite (P. I.)	Mar. 2	5,916.2985	U. S. S. Pecos U. S. S. Pecos	3,978.355		1804	Mar. 10	5,915.29	60,641.97
Adjustment on bills Nos. 1046-1047-1244							417	Apr. 16		5,742.67
Hermione	United States Navy, Cavite (P. I.)	Apr. 20	7,172.5313	Naval shore tanks	7,172.5313	18,056.34	312	May 14	7,172.5313	73,518.45
Akera	United States Navy, Cavite (P. I.)	May 12	6,865.76	U. S. S. Pecos			768	June 27	6,865.76	70,374.04
Semiramis	United States Navy, Cavite (P. I.)	June 18	7,922.2547	Naval shore tanks	7,907.352	20,122.53	254	July 11	7,922.2547	81,203.11

Total quantity delivered, 50,167.6058 tons. Total paid, $514,217.87.

XV. On December 28, 1922, Smith, Bell & Co. Ltd., by O. W. Darch, agents for the Asiatic Petroleum Co. (P. I.) Ltd., wrote to the supply officer at the United States naval station, Cavite, concerning the deliveries of fuel oil under contract No. 56924, as follows:

G-44-N GM MANILA, *December 28, 1922.*

SUPPLY OFFICER,
U. S. Naval Station, Cavite.

LIQUID FUEL TO U. S. S. "PECOS"

SIR: Further to our letter of December 14th and to your reply of December 19th regarding the shortage of 38 tons on the occasion of the loading of the above vessel at Tarakan in July, we have pleasure in forwarding you herewith copy of a further letter we have received from Belikpapan, and we shall be glad to receive your comments in due course.

As regards deliveries against the contract recently concluded in New York for 200,000 barrels, and with reference to our telephone conversation with your department yesterday afternoon, we beg to advise you that we are in receipt of the following information regarding conditions of delivery:

Delivery to be effected between 1st January and 30th June, 1923, and the oil to be paid for at the rate of gold $10.25 per ton, payment to be made on bill of lading quantity. The oil will be shipped to Cavite in our own tankers and both the tanker and the cargo will be consigned to you in order to obviate the possibility that we may be called upon to pay duty. The period of free discharge is laid down as 96 hours, and thereafter demurrage will be at the rate of gold $19 per hour.

We understand that you wish the cargo of the *Hermione*, which is due to arrive with the first shipment against the contract early next month, to be delivered partly into the *Pecos* and partly into Navy tank at Cavite. We understand that you are not certain as to manner in which the cargo can be checked, but in view of the stipulation that payment be on bill of lading quantity this point would appear to be of minor importance. Your representatives will, however, be at liberty to check the tanker's measurements prior to discharge.

Respectfully yours,

For THE ASIATIC PETROLEUM CO. (P. I.) LTD.,
SMITH, BELL & CO. LTD., *Agents.*
(Sgd.) O. W. DARCH.

GM/1 p
Encl. as above.

XVI. On March 19, 1924, Smith, Bell & Co. Ltd., agents for the Asiatic Petroleum Co. (P. I.) Ltd., wrote to the supply officer United States naval station, Cavite, concerning the deliveries of fuel oil under contract No. 57684 as follows:

THE ASIATIC PETROLEUM CO. (P. I.), LIMITED,
SMITH, BELL & CO. LTD., AGENTS, P. O. Box 441,
Manila, March 19th, 1924.

In reply please quote: G-46-X-SC.

SUPPLY OFFICER,
U. S. Naval Station, Cavite.

Attention of Com. Gudger.

DEAR SIR: We are in receipt of a telegram from our Hongkong office in which they ask us to make clear the following points re duty on liquid fuel delivered to the U. S. Navy:

1. The cargo which you received per S. S. *Anstina* toward the end of January, 1924, and which was discharged into the *Pecos*—was this cargo reexported? If so, we presume it will be free of duty.

2. The *Eburna* cargo of November, 1923. This was delivered to the *Pecos*. Could you kindly inform us what actually happened to this oil, so that we can understand whether it is dutiable or not?

3. The *Cowrie* November shipment. We understand that this cargo was first delivered to the *Pecos* but later transferred to the shore tanks, but we have some idea that you think it possible that we may not have to pay duty on this cargo. Will you kindly advise us regarding this point?

4. The *Gold Shell* December cargo. As this was delivered into the shore tanks, we presume this cargo is definitely dutiable.

We should be very much obliged if you would kindly give us a reply as soon as possible, as our Hongkong office are asking us to telegraph them promptly regarding this matter. Thanking you in anticipation, we are, dear sir,

Yours faithfully,

For THE ASIATIC PETROLEUM CO. (P. I.), LTD.,
SMITH, BELL & CO. LTD., *Agents.*

SC/EC

XVII. Contract No. 56924 terminated on June 30, 1923, and contract No. 57684 terminated on June 30, 1924.

XVIII. The plaintiff did not pay any customs duties to the Philippine Government on fuel oil delivered under con-

tracts numbers 56924 and 57684, and the plaintiff at all times refused to permit any such customs duties to be paid by the defendant for the plaintiff's account.

XIX. No claim was made by the Philippine customs authorities for customs duties on fuel oil delivered under the contracts against the plaintiff at any time and no claim by the Philippine customs authorities for such duties was made against the Navy until complete deliveries under contract 56924 had been made and paid for, and two cargoes had been delivered under contract 57684.

XX. The plaintiff was not advised that any claim had been made against the Navy by the Philippine customs authorities for customs duties on fuel oil delivered under contract 56924 until July 29, 1924.

XXI. The amount of duty assessed against the Navy in respect of the various cargoes of fuel oil delivered under the two contracts was as follows:

Contract No. 56924

Name of ship:	Amount of duty	
Semiramis	$19, 852. 64	
Argonauta	8, 161. 04	
Hermione	18, 056. 34	
Semiramis	20, 122. 53	
		$66, 192. 55

Contract No. 57684

Gold Shell	20, 320. 00	
Semiramis	20, 226. 33	
Placuna	15, 137. 28	
		55, 683. 61
		121, 876. 16

XXII. In May, 1924, the collector of insular customs of the Philippine Islands refused to issue permits to the Navy to receive future cargoes of freight until customs duties on past deliveries had been paid, and also refused to issue permits on outgoing shipments for the Navy.

XXIII. After negotiations by officers of the Navy with the collector of insular customs of the Philippine Islands he agreed to issue permits for incoming and outgoing cargoes for sixty days from June 2, 1924, with the understanding all bills would be settled within sixty days from that day.

Opinion of the Court

XXIV. In making payments for the fuel oil delivered under contract No. 57684 certain amounts were withheld by the Navy to cover the estimated customs duties on fuel oil delivered under that contract and contract No. 56924, as follows:

Name of ship:	Amount withheld	
Cowrie	$16, 951. 43	
Eburna	18, 560. 57	
Gold Shell	20, 321. 35	
Anatina	17, 321. 07	
Placuna	49, 111. 35	
Buccinum	18, 087. 88	
Total		$140, 353. 65

XXV. All fuel oil delivered under contracts numbers 56924 and 57684 was either reexported from the Philippine Islands by the Navy or used in the propulsion of naval vessels.

XXVI. Under date of January 5, 1925, the Navy purchasing officer at San Francisco was authorized to make payment to the plaintiff of the $18,477.49 withheld from payments to it in excess of the customs duties levied, and this amount was paid to plaintiff on January 14, 1925.

XXVII. No payment has been made by the defendant to the government of the Philippine Islands of the sum of $121,876.16, or any other sum on account of customs duties on cargoes of fuel oil delivered by the plaintiff under contracts 56924 and 57684 and assessed against the Navy as set forth in Finding XXI.

The court dismissed the counterclaim, and gave judgment for plaintiff in the sum of $121,876.16.

MOSS, *Judge*, delivered the opinion of the court:

Plaintiff, Asiatic Petroleum Co., is suing for the recovery of a balance of $121,876.16 due on purchase price of fuel oil sold by plaintiff for the use of the Navy under a certain contract dated May 7, 1923. The amount claimed is admitted, but defendant has interposed a counterclaim for the same amount alleged to be due and owing to the Philippine government as customs duties on oil delivered under this con-

tract and also under a prior contract dated December 18, 1922. No duties have been paid by either the Government or plaintiff, the Government contending, however, that it will be required to pay same to the Philippine customs officials.

It is stipulated that the oil under both contracts was consigned to the United States. Section 15 of the Philippine tariff act, 36 Stat. 174, provides that all property imported into the Islands shall for the purpose of that act be deemed to be "the property of the person to whom the same may be consigned." The United States would therefore, as between the parties, be liable for customs duties, if any should be collectable, unless expressly assumed by plaintiff under the contract. It is contended by defendant that under the terms of the contract plaintiff obligated itself to pay such duties, and in support of that contention cites paragraph 3 of said contract, which reads as follows: "The customs duties on imported articles used in the fulfillment of this contract are included in the price herein set opposite each item, and therefore the contractor will not be entitled to free entry or remission of any customs duties." Each contract in this case consisted of a standard printed form of Navy contract, used in connection with the purchase of all manner of supplies, within which was inserted a mimeographed schedule relating to the proposed purchase of fuel oil. The mimeographed portion of the printed form invited proposals for fuel oil to be delivered at a number of places, including Cavite, Philippine Islands. Plaintiff bid only on the oil to be delivered at Cavite, and there was inserted in appropriate places, in typewriting, plaintiff's proposal, which in part is as follows: "* * * but maximum annual quantity not to exceed 750,000 bbls. to be delivered c. i. f. Cavite, in cargo lots * * *." By this provision plaintiff limited its obligation to a quantity not to exceed 750,000 barrels "to be delivered *c. i. f. Cavite*," at $11.48 per ton. Plaintiff's proposal was accepted and became the contract between the parties. The term "c. i. f." has a well-understood legal meaning in commercial transactions. In simple terms it means that the price quoted included cost of goods at point of shipment, insurance, and freight to point of delivery. All other charges, if any, including import duties being assumed by the buyer.

Thames & Mersey Insurance Co. v. *United States*, 237 U. S. 19, 26, and numerous other decisions cited in plaintiff's brief. The paragraph in the printed portion of the contract upon which defendant relies is clearly inapplicable to the contract under consideration, and obviously refers to customs duties accruing to the United States and concerning which the United States could contract. It will be readily seen that the Government would have no authority either to relieve the contractor from the payment of customs duties imposed by the Philippine government or to remit such duties. Manifestly this printed paragraph was left in the contract by inadvertence. At any rate, it is inconsistent with the typewritten matter mentioned, and the latter must be regarded as the true agreement between the parties. *Harper* v. *Hochstim*, 278 Fed. 102. It is claimed by defendant that the contract in this case is only a modified c. i. f. contract by reason of the fact that insurance policies and certain freight credit memoranda were not delivered to the defendant as contemplated under a c. i. f. contract. However, prepaid bills of lading were in each shipment delivered to the master of the ship, an independent carrier, for delivery to the proper naval authorities and same were so delivered. No better evidence that the freight had been paid could have been supplied. Insurance was secured, payable to the account of plaintiff, or "whom it may concern." Failure to deliver same to the naval authorities constituted, at most, a breach of contract, without damage to defendant. If there had been a loss, unquestionably defendant's rights would have been protected under the clause "whom it may concern," but there was no loss, and the mere failure to deliver the policies to the naval authorities is immaterial. The contract is a *c. i. f.* contract in all essential characteristics, and under such a contract plaintiff is not liable for any charges, except cost, insurance, and freight.

While not necessary to a decision of the case, it is not inappropriate to state that the court is in extreme doubt as to whether or not the oil in question was dutiable. Whatever may be said as to when the title to the oil passed, as between the parties, such oil for the purposes of the tariff act

was the property of the United States at the time of its importation into the Philippine Islands. Is the United States liable for customs duty on property imported by it and for its own use? The act itself is silent on that question. It should be remembered that no duties were demanded until after the full completion of the first contract under which 50,167.6058 tons of oil were delivered and paid for, and until after 14,460.7 tons under the second contract had been delivered. It can therefore be said that the customs officials themselves did not at first regard this property as dutiable. It should also be noted that when duties were subsequently assessed it was sought to impose same only on that portion of the oil which was delivered into naval tanks at Cavite, and not on the oil discharged directly into the U. S. S. *Pecos*. Both deliveries were within the jurisdiction of the Philippine Islands. The first section of the act, 36 Stat. 130, provides that the duties therein imposed shall be levied upon "all articles * * * entering the jurisdiction of the Philippine Islands from any place or places, including the United States and its possessions, and in any manner whatsoever, either with intent to unlade therein, or which, after such entering, are consumed therein or become incorporated into the general mass of property within said Islands * * *." It is stipulated that all the oil discharged into shore tanks was either reexported or consumed in the propulsion of Navy vessels. The delivery into said tanks was a temporary matter of convenience. Section 21 of said tariff act provides "that on all fuel imported into the Philippine Islands, which is afterwards used for the propulsion of vessels engaged in trade with foreign countries, or between ports of the United States and the Philippine Islands, or in the Philippine coastwise trade, a refund shall be allowed equal to the duty imposed by law upon such fuel, less one per centum thereof, which shall be paid under such rules and regulations as may be prescribed by the insular collector of customs." It is true that this provision applies only to merchant ships. However, the startling incongruity presented by this situation in connection with the attitude of the Philippine government concerning the liability of the

Syllabus

United States for the payment of tariff duties is worthy of consideration. Under section 21 this oil which was used for supplying naval vessels would have been subject to a refund of duties if, instead of having been imported by the United States for such purposes, it had been imported and stored in tanks by a steamship company and subsequently used for the same purpose. It will scarcely be believed that Congress intended to produce a situation which would result in such an unjust discrimination.

The purpose of the statute providing for customs duties on importations into the Philippine Islands was to provide revenue for the use of the Philippine government, for the protection, and partial support of which the United States held itself responsible. It is inconceivable that Congress in the enactment of the said statute should have intended that the United States would be required to pay duty on its own oil imported into the Philippine Islands, for its own use, in supplying its Navy vessels used in the protection of the Philippine government, as well as for the maintenance of its own Military and Naval Establishments in the national defense. It is not necessary to decide any other questions at issue in the case. Plaintiff is entitled to recover herein, and defendant's counterclaim should be dismissed, and it is so ordered and adjudged.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

FIRST NATIONAL BANK OF KULM v. THE UNITED STATES

[No. H-55. Decided April 2, 1928]

On the Proofs

Income tax; interest on loans prior to bank merger; collection thereafter and payment to old stockholders.—Where in a merger of two banks it is agreed that interest on certain loans accruing prior thereto shall be paid to the old stockholders and not become an asset of the new bank, and it is collected by the new bank and so paid, it is not income to the new bank and can not be taxed as such.

The Reporter's statement of the case:

Mr. Jesse I. Miller for the plaintiff.

Mr. R. C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Alexander H. McCormick* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a national bank organized under the laws of the United States, with its principal place of business in Kulm, North Dakota. During the years 1920 and 1921 it was conducting a general banking business.

II. In November, 1920, plaintiff entered into an agreement with the Lamoure County Bank for the consolidation of the two banks to become effective January 3, 1921. The First National Bank had outstanding certain loans which matured subsequent to the making of the agreement above referred to and prior to January 3, 1921. It was agreed between the two banks that in so far as possible these loans would not be renewed by the First National Bank but would be continued in their then condition until after January 3, 1921, the effective date of the merger, it being contemplated by the merging banks that such an arrangement would be advantageous to them. On January 3, 1921, the consolidation became effective and the merged banks continued in business under the name of First National Bank of Kulm, which is the plaintiff.

III. Between the date of the merger agreement and January 3, 1921, certain loans of the First National Bank matured, the interest on which amounted to $4,898.58, which interest would have been paid in the year 1920 but for the agreement and arrangement above referred to.

IV. This interest item of $4,898.58 was accrued on the books of the First National Bank during the year 1920, but was collected by the plaintiff, that is, the merged bank, during 1921, and reported by it as income for the year 1921.

V. It was provided, however, in said consolidation agreement, that this interest, when actually collected by the consolidated bank, should be paid to the old stockholders of the First National Bank as constituted prior to January 3, 1921.

Opinion of the Court

When such interest was actually paid to the consolidated bank in 1921 it was credited to the accounts of such old stockholders.

VI. The Commissioner of Internal Revenue refused to eliminate the item of $4,898.58 from the plaintiff's income for the year 1921, such refusal producing a deficiency in tax for that year of $812.73, of which the plaintiff was duly notified by the Commissioner of Internal Revenue.

VII. Thereafter, on May 8, 1925, the plaintiff appealed to the Board of Tax Appeals, and, after a hearing, the board affirmed the decision of the Commissioner of Internal Revenue on July 14, 1925.

VIII. Thereafter the Commissioner of Internal Revenue assessed the sum of $812.73 against plaintiff, and the said amount, with interest in the sum of $219.44, was paid by plaintiff, under protest, on September 18, 1926. Plaintiff filed a claim for refund of said amounts on September 28, 1926, which claim was rejected by the Commissioner of Internal Revenue on December 15, 1926.

IX. The interest item of $4,898.58 was not income to plaintiff for the year 1921.

The court decided that plaintiff was entitled to recover $1,032.17, with interest.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff is an association resulting from the merger of the First National Bank of Kulm and the Lamoure County Bank. The merger agreement was entered into in November, 1920, and was carried into effect on January 3, 1921. At the time of the agreement the First National Bank of Kulm, which may be called the old bank as distinguished from the merged bank, owned certain notes which would mature before the date of consolidation, and it was agreed between the two banks that these notes would not be renewed and that the interest accumulating thereon after their maturity and up to payment should be collected by the merged bank and paid to the stockholders of the old bank; that is, this interest should not become an asset of the merged bank. It was collected after the merger in 1921 and entered to the credit of the stockholders of the old bank.

Syllabus

The Commissioner of Internal Revenue held that, as the plaintiff kept its books on a cash basis and this interest was paid in 1921, it was income for that year and not 1920. We are in accord with this view. However, the tax levied and collected was upon the theory that this interest was income of the plaintiff for the year 1921. With this we can not agree. Under the agreement the interest when collected was not an asset or the property of the merged bank but the property of the stockholders of the old bank, for which the merged bank merely acted as a collection agency. It was received in that capacity and credited to the stockholders of the old bank. It became income to them but was not income to the plaintiff.

The plaintiff is entitled to recover the amount of the additional tax assessed against it for 1921, with interest from September 18, 1926. Let judgment be so entered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

NEW YORK CENTRAL RAILROAD COMPANY, LESSEE OF THE BOSTON & ALBANY RAILROAD, v. THE UNITED STATES

[No. F-339. Decided April 2, 1928]

On the Proofs

Mail pay; jurisdiction; determination by Interstate Commerce Commission; refusal of Government to pay; remedy.—When a statute creates a right against the United States but furnishes no remedy, it may be found in the Court of Claims, and where under the act of July 28, 1916, the Interstate Commerce Commission has determined a fair and reasonable compensation for mail service rendered, which the Government refuses to pay, claim therefor is found upon a law of Congress and cognizable by the Court of Claims.

Same; authority of Interstate Commerce Commission to determine past compensation; allowance of interest.—Under the act of July 28, 1916, the Interstate Commerce Commission was authorized to determine fair and reasonable compensation for mail service rendered from and after the date of application for such determination, and an increase in rates so determined is recoverable by suit against the United States. In giving

judgment for such an increase the Court of Claims does not determine just compensation, but gives effect to an authorized order of the Interstate Commerce Commission, and interest thereon is forbidden by statute.

The Reporter's statement of the case:

Mr. George H. Fernald, jr., for the plaintiff.

Messrs. Lisle A. Smith and *Joseph Stewart*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, a corporation, is a common carrier by railroad, engaged in intrastate and interstate commerce, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States, as set forth in Paragraph I of the petition.

II. Pursuant to authority of section 5 of the act of July 28, 1916, 39 Stat. 412, 427, making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1917, and for other purposes, the United States, through the Postmaster General, has, since November 1, 1916, when the mail service was placed on the space basis thereunder, including the period between February 25, 1921, and December 13, 1923, required the plaintiff to transport, and the plaintiff has transported, on its rail lines the United States mails under the conditions and with the service prescribed by the Postmaster General.

III. Acting under the authority and requirements of said act of Congress, the Interstate Commerce Commission by an order dated December 23, 1919, a copy of which, Exhibit A, is attached to the petition in this case and made a part hereof by reference, established the fair and reasonable rates of payment for transportation of mail matter by railroads subject to the act until further order or orders of the commission, including the plaintiff herein.

IV. The plaintiff filed with the Interstate Commerce Commission on February 25, 1921, an application for a reexami-

nation of the facts and circumstances surrounding the transportation of the mail upon its lines and the service performed by it in connection therewith in accordance with the further proceedings provided for under said act, and requested the commission by an order to determine the fair and reasonable rates for the period since September 1, 1920, and for the future, and further requested the commission to order such readjustment of compensation for service rendered from September 1, 1920, to the date of its order as it should deem proper.

V. The Postmaster General filed his answer to the application of the railroads specifically objecting to a reexamination with reference to the period since September 1, 1920, and the request for an order fixing rates of pay during said period, and directing a readjustment of compensation for service rendered from September 1, 1920, to the date of an order to be made therein, on the ground that such finding and order would be retroactive and in contravention of the rights of the Government under rates theretofore fixed by the commission for service required by the Postmaster General, performed by the carriers and fully paid for by the Postmaster General, and unauthorized by law.

VI. Thereafter the commission by order of March 7, 1921, reciting the provisions of the act, *supra*, providing that after the lapse of six months from the entry of an order the Postmaster General or any carrier may apply for a reexamination and after further reciting that the plaintiff herein had filed an application for a reexamination of the facts and circumstances surrounding the transportation of United States mails upon its lines and the service performed by it in connection therewith, with special reference to the period since September 1, 1920, ordered that the proceedings be reopened for reexamination and such further hearing as the commission might direct with respect only to the facts and circumstances surrounding the transportation of mails and the services connected therewith upon the lines of the applicant.

VII. In the proceedings had thereunder new and additional evidence and testimony different from that submitted

in the original case, on which the commission's order of December 23, 1919, was based, was submitted by all parties interested, based on reports of actual operation for the month of June, 1921, selected as a representative period, supplemented by evidence bringing data up to 1923 as far as practicable. (85 I. C. C. pp. 175–179.)

VIII. Thereafter and following the said proceedings and hearings instituted by the Interstate Commerce Commission the said commission made a report on December 13, 1923, reciting *inter alia:* "It is our opinion that in a proceeding upon application for a reexamination under the act of July 28, 1916, we have authority to establish rates only for the future and not for the past. The carriers' request for findings as to the past is therefore denied;" and issued an order reciting its previous orders, the application of the railroads for a reexamination, as provided by law, the reopening of the proceedings for reexamination with respect only to the facts and circumstances surrounding the transportation of the mails and the services connected therewith, and established as fair and reasonable rates to be received by the roads on and after December 13, 1923, a schedule of rates therein set forth, but made no order as to the period prior to December 13, 1923.

IX. Thereafter the New England carriers, including the plaintiff herein, petitioned the commission to reconsider its report and order of December 13, 1923 (85 I. C. C. 157, 182), in so far as it involved the denial of their request that the commission find what a fair and reasonable rate would have been for the transportation of the mails between the date of filing the petition of the carriers, February 25, 1921, and the date of said order, December 13, 1923, and its failure to order a readjustment of pay for said period.

The Postmaster General filed his answer setting forth that such a readjustment would be retroactive and in contravention of the rights of the Government under the rates fixed by the commission for service required by the Postmaster General and performed by the carriers and fully paid for and unauthorized by law.

Thereafter the commission made a report on January 12, 1925, that the rates of mail pay for the service rendered by

the applicant carriers on and after February 25, 1921, were not fair and reasonable, and that the rates fixed and determined by the commission to be fair and reasonable for services rendered by the applicants on and after December 13, 1923, were the fair and reasonable rates for the service rendered on and after February 25, 1921, but made no order fixing new rates for the period from February 25, 1921, to December 13, 1923.

X. Thereafter the Postmaster General filed his petition with the commission for a rehearing and revision of the finding set forth in Finding IX, *supra*. Following this, on May 1, 1925, the carriers, including the plaintiff, petitioned the commission to issue an order fixing and determining as the fair and reasonable rates for the service as of February 25, 1921, to December 13, 1923, the rates found to be fair and reasonable for said period in its report of January 12, 1925, to which the Postmaster General filed his reply on May 13, 1925, opposing said petition.

XI. The Interstate Commerce Commission made a report on December 8, 1925, affirming its previous findings as to rates and issuing an order establishing such rates as fair and reasonable with respect to the plaintiff herein for the period from February 25, 1921, to December 13, 1923, a copy of which, marked "Exhibit C," is attached to the petition in this case and made a part hereof by reference.

XII. The New England carriers, including the plaintiff herein, demanded of the Postmaster General a readjustment of the compensation for carrying the mails by them during the period from February 25, 1921, to December 13, 1923, upon the basis of the rates found in the commission's said report and order of December 8, 1925.

To this demand the Postmaster General replied that there was no authority of law to pay the claims, and called attention to the opinion of the Comptroller General upon the subject.

Thereafter the Postmaster General applied to the commission for a reconsideration of its decision, submitting the opinion of the Comptroller General, which application the commission denied.

XIII. For the period between February 25, 1921, and December 13, 1923, inclusive, plaintiff received from the United States for transportation of the mail on its railroad the sum of $2,096,903.27. The amount which would have accrued under the said order of the Interstate Commerce Commission of December 8, 1925, if valid, would be $2,821,621.78, leaving a balance of $724,718.51, which is the amount of the plaintiff's claim in this case.

The court decided that plaintiff was entitled to recover $724,718.51.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This is a suit by a railroad company asking judgment for an amount, determined by an order of the Interstate Commerce Commission, as compensation for the transportation of mails and services connected therewith. The facts are stipulated and a short history of them showing the cause of the suit may be stated as follows: The carrier was engaged in the service mentioned under the act of July 28, 1916, 39 Stat. 429, that requires railway common carriers to transport mail matter offered by the Postmaster General and provides a method for determining "a fair and reasonable compensation" for the service.

The commission had made an order fixing the compensation effective December 23, 1919, and the carrier was in the performance of the required service receiving the compensation fixed by this order, when, on February 25, 1921, it filed its application for a reexamination of the facts and readjustment of the compensation. Thereupon the commission entered an order that the proceedings be reopened for such further hearing as they might direct. New and additional evidence having been introduced, different from that on which the order of December 23, 1919, had been based, the commission made a report under date of December 13, 1923, stating, among other things, it was their opinion that in a proceeding upon application for a reexamination "under the act of July 28, 1916," they had "authority to establish rates only for the future and not for the past."

The carriers' "request for findings as to the past" was therefore denied. They accordingly made an order establishing a schedule of rates on and after December 13, 1923, but made no order as to the period prior to that date. Following this order there were applications by the carriers and by the Government, set forth more at length in the findings, with the result that on January 12, 1925, a report was made by the commission to the effect that the rates of mail pay for the service rendered "on and after February 25, 1921," the date of the application, were not fair and reasonable, and that the rates mentioned in the order of December 13, 1923, were fair and reasonable rates for the service rendered on and after February 25, 1921. No order was made, however, fixing the new rates for the period in question until their report on December 8, 1925, when the commission, affirming their previous findings as to rates, issued an order establishing such rates as fair and reasonable with respect to the plaintiff herein for the period from February 25, 1921, to December 13, 1923, that being the period in question. By an application of the rates prevailing before these dates, the plaintiff had been paid a large sum, but if entitled to receive for the period in question the rates found and ordered by the commission, there is due the carrier the additional amount of $724,718.51.

The contention of the parties turns upon the authority of the commission to make their order of December 8, 1925, fixing the schedule of rates as the fair and reasonable compensation to which the carrier was entitled from February 25, 1921, the date of the filing of the application therefor to December 13, 1923, from which date the new rates had in fact been applied, and the further contention that in any event this court is without jurisdiction in the premises.

1. We think the court has jurisdiction because the carrier is asserting a claim founded upon a law of Congress.

When by the act of July 28, 1916, all railway common carriers were "required" to transport such mail matter "as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General," and further pro-

vided a severe penalty for any railroad company refusing to perform the service, it became not only proper, but necessary, that provision be made for compensating them, and the act declared that they should be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith. To this end the Interstate Commerce Commission was empowered and directed, "as soon as practicable," to fix and determine from time to time the fair and reasonable compensation which the act declares the carrier is entitled to receive. The basis for such determination is stated and the method of procedure is prescribed by the act, and it is also provided that when the commission shall establish by order a fair and reasonable rate or compensation to be received at such stated times as may be named in the order, the Postmaster General should pay the same. Provision is made for reexaminations, on application of the Postmaster General, or any carrier after the lapse of six months "from the entry of the order assailed" and thereupon substantially similar proceedings as those leading up to the order assailed, are to be had "with respect to the rate or rates for service covered by said application." The commission has determined and ordered that for the period in question the carrier was entitled to a stated compensation, the Postmaster General has refused to pay this compensation, or at least a large part of it, and assuming, for the argument, that this order was authorized, where can the carrier get relief in the situation in which it thus finds itself unless it may sue in the Court of Claims? The act does not contemplate a refusal on the part of the Government's agents to pay the compensation ordered by the commission, but does contemplate compliance by the payment of the same. As generally stated, the rule is that where the statute creates a right against the United States, but does not furnish the remedy, it may be found in the Court of Claims.

The authorities are carefully reviewed in *Foster's case*, 32 C. Cls. 170, 185, where conclusions are stated, among them that where an officer authorized to determine the claim allows it but the accounting officers or the Secretary of the Treasury

refuses to give effect to the award, an action thereon will lie in this court. In *Newcomber's case*, 51 C. Cls. 408, the later cases are reviewed and a like conclusion is reached. In *Kaufman's case*, 11 C. Cls. 659, the facts showed that the Commissioner of Internal Revenue had determined that the party was entitled to a refund and awarded an allowance, but the Treasury refused to carry out the award by making payment, and the court held it had jurisdiction of the suit brought to recover the award. Upon appeal to the Supreme Court, 96 U. S. 567, it was said (p. 569): "The claim has been presented to and allowed by the proper officer. The claimant has pursued the statutory remedy to the end. He is satisfied with the decision that has been given, and insists upon the payment which the Government has undertaken to make. No special remedy has been provided for the enforcement of the payment, and consequently the general laws which govern the Court of Claims may be resorted to for relief, if any can be found applicable to such a case. * * * Here the right has been given and a liability founded upon a law of Congress created. Of such liabilities the Court of Claims has jurisdiction, and no other remedy has been provided." A similar question arose in *United States* v. *Savings Bank*, 104 U. S. 728, and it was again held that where the commissioner had ascertained the amount due and payment was not made by reason of the refusal of any of the officers of the department to pass or pay the claim, after its allowance by the commissioner, "the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake." Such a claim, it was said (p. 733), was founded on a law of Congress within the meaning of that term as used in defining the jurisdiction of the court. In a somewhat different form the question again arose in *Weld's case*, 23 C. Cls. 126. Weld & Company had recovered judgment in the Court of Commissioners of Alabama Claims. An act provided that such judgments should be paid out of the sum of money that had been paid to the United States pursuant to article 7 of the treaty of Washington, while a later act provided how the account should be stated by

accounting officers for the purpose of distribution among judgment creditors. This court held and the ruling was affirmed by the Supreme Court, 127 U. S. 51, 57, that the claim was "founded upon a law of Congress." In *Medbury's case*, 173 U. S. 492, reversing the judgment of this court, the primary question was whether the Court of Claims had jurisdiction; and the Supreme Court, recognizing the rule that where a special right is given by statute and in that statute a special remedy for its violation is provided, the statutory remedy in such case is the only one, holds (p. 498) that such principle had no application to this particular statute, "because the statute does not, in our judgment, within the meaning of the principle mentioned, furnish a remedy for a refusal to grant the right given by the statute." In the case of *T. A. Gillespie Co.*, 60 C. Cls. 923, this court held that it had jurisdiction, as of a claim founded on a law of Congress, of an award made by the Secretary of War under the Dent Act, payment of which had been refused. Considering this act of July 28, 1916, we said in *Missouri Pacific Railroad Co. case*, 59 C. Cls. 524, 530, that if the Post Office Department had refused to pay the compensation fixed by the commission it could have been urged that an action therefor was based upon a law of Congress directing that payments be made in accordance with the commission's decision. We need not multiply decisions. The jurisdiction of this court to determine the numerous cases seeking to recover taxes paid where the commissioner has refused to refund the same is sustained because the claim is founded upon a law of Congress. See also *United States* v. *Emery*, 237 U. S. 28; *Hvoslef case*, 237 U. S. 1, 10; *McLean case*, 226 U. S. 374; *Chicago & Eastern Illinois Ry. Co.*, 63 C. Cls. 585.

In the instant case, the statute empowers the Interstate Commerce Commission to determine the fair and reasonable compensation, but when this has been done the statute is silent as to the enforcement of their judgment if payment be refused. We have no doubt that the Court of Claims has jurisdiction in such case.

2. The next defense urged goes to the power of the Interstate Commerce Commission to make the order applicable to the period in question, the Government contending that

Opinion of the Court

the commission may not issue an order "effective retroactively," and that the order relating back to the date of the carriers' application for reexamination of the rates or compensation is unauthorized. At the expense of a repetition of references already made to the act of July 28, 1916, recourse must be had to the terms of the statute. There can be no doubt that the commission was made a special tribunal to fix and determine, from time to time, the reasonable rates and compensation for the service the carriers were required by the act to render. It alters the system of railway mail pay existing at the date of the act. Generally speaking, the relation between the Post Office Department and the railway mail carriers had been determined by contract. See *Kansas City, Mexico & Orient Railway Co.—The Mail Divisor cases*—53 C. Cls. 258, 251 U. S. 326. Citing a number of cases we said, in these *Divisor cases*, that the railroad companies were "until the act of July, 1916," free to accept or refuse the terms proposed by the Postmaster General for the transportation of mails. In *New York, etc., Railroad Co.*, 251 U. S. 123, 127, it is said: "We think it must be treated as settled doctrine that prior to the act of July 28, 1916—with the exception of certain roads aided by land grants—railroads were not required by law to carry the mails." The act provided a different method. Its language is clear: "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States, in the manner, under the conditions, and with the service prescribed by the Postmaster General." It is made unlawful for any such company to refuse and heavy penalties are prescribed for any such refusal. It can hardly be affirmed that the carriers were any longer "free to accept or refuse" the terms offered by the Postmaster General. Having thus required a service, the act provides for the determination of just compensation. "Reasonable compensation and just compensation mean the same thing." *Sweet* v. *Rechel*, 159 U. S. 380, 400. The omission from the act of some provision for determining fair compensation might have left it subject to serious objections. See *Sweet* v. *Rechel*, *supra; Monongahela Naviga-*

tion Co. v. *United States*, 148 U. S. 312; *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago*, 166 U. S. 226, 236. But provision is made in that the act prescribes that the carriers "shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." The determination of this fair and reasonable compensation is confided to the Interstate Commerce Commission. It is recognized that there may be a distinction between the required service and the ordinary transportation business of the railroads, and the commission is enjoined that, in fixing and determining the fair and reasonable rates for this service, the relations of the parties and the nature of the service shall be considered. It is provided that "pending the decision" of the commission, the existing method and rates of railway mail pay should remain in effect. The procedure to be followed by the commission for the ascertainment of the rates and compensation is stated, and having concluded the hearing, "the commission shall establish by order a fair, reasonable rate or compensation to be received at such stated times as may be named in the order for the transportation of mail matter and the service connected therewith," and during the continuance of the order such rate or compensation shall be paid. In virtue of this act, the commission after full investigation and hearing of the parties made their report on the 23rd day of December, 1919, and on the same day entered their order providing "the fair and reasonable rates of payment for transportation of mail matter as of November 1, 1916, and to January, 1, 1918," as stated in the order and further that the fair and reasonable rates on and after January 1, 1918, should be 25 per cent additional to the rates prescribed as of November 1, 1916.

The act authorized either the Postmaster General or the carrier "after the lapse of six months" from the entry of an order to assail it by applying for a reexamination and thereupon substantially similar proceedings are to be had "with respect to the rate or rates for service covered by said application" as are prescribed for the prior examination. The carrier in this case made application in accordance with this provision, filing the same on February 25, 1921. It

followed the course detailed earlier in this opinion. The commission made a report on December 13, 1923, and entered an order establishing a schedule of rates effective from and after that date, but stated in their report that in their opinion they had "authority to establish rates only for the future and not for the past." It was not until December 8, 1925, that the commission ordered that the rates and compensation ascertained and determined by their order of December 13, 1923, should be effective from and after February 25, 1921, the date of the filing of the carriers' application. This order responded to the prayer of the application. In their initial order of December, 1919, the commission had established one rate or compensation for the period from November 1, 1916, to January 1, 1918, and in doing this had done what the statute required. They also ordered a different rate or compensation from and after January 1, 1918. Why this latter action was not the fixing of a rate for the past is not made clear when it is seen that the order was made nearly two years after the effective date, and that the commission had the authority to make it there is and can be no question raised. But authorized as they are to consider applications for a change in rate or compensation, and to grant relief thereon, the contention is, as stated already, that the order may not make provision for compensation from the date the earlier order is assailed. If this be sound it is manifest that in almost every application for relief from existing rates there must be a period during which the examination by the commission proceeds when the carrier will not receive the compensation it would otherwise be accorded, with the result that the carefully provided plan for determining this compensation of carriers is ineffective for the purposes it was designed to accomplish. In the instant case there is a period of about two years involved, but the final order made effective for this period was not made until more than four years after the proceeding was inaugurated by application duly filed. The act provides for a reexamination of the rates for service "covered by the application," and the latter was filed in February, 1921. By this application the earlier order was "assailed," to use the language of the act. The commission

could determine that the rate or compensation being received was proper and sufficient or they could find the carrier was entitled to more and order that the same be paid. As the application initiated the proceeding, the order should relate to the time it was filed. The provision that the orders "shall continue in force" until changed by the commission after due notice and hearing does not limit the commission's power to fix the rate on or after the date of the application. Their order, when made, changes the earlier order and becomes effective as stated by them. Nor is it any answer to this view to say, as the Government does say, that Congress reserved to itself the power of direction and allowance, which in this case was to be made through the Postmaster General and not by the commission. But Congress did not reserve any such power to itself. It erected a tribunal or accepted one already in existence to discharge a duty which was judicial in its nature, the ascertainment of reasonable compensation to carriers for services exacted by statute. "But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial." *Monongahela Navigation Company*, 148 U. S. 312, 327. In our opinion, Congress not only did not attempt to reserve power in itself to determine the fair and reasonable compensation the carriers should receive for the service but it intended to place the entire matter in a tribunal fully equipped to perform the judicial duty involved. This duty having been discharged and the amount payable ascertained, the carrier is entitled to judgment. One of the reasons assigned for the nonpayment is the lack of appropriation, and this may be a sufficient reason for the accounting officers or the Postmaster General if the appropriations for the period in question were exhausted. But it furnishes no reason why this court may not render its judgment for the amount due. We do not think the plaintiff can have judgment for interest on the deferred payments. We are not determining just compensation but are giving effect to an authorized order of the Interstate Commerce Commission. In such case the statute

forbids the allowance of interest. Sec. 177, Judicial Code, as amended. Cases cited in *Liggett & Myers Co. case*, 61 C. Cls. 693, 704.

Judgment will be entered accordingly. And it is so ordered.

Moss, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

UNION LAND & TIMBER CO. v. THE UNITED STATES

[No. E-606. Decided April 2, 1928]

On the Proofs

Capital-stock tax; sec. 1000 (a), revenue act of 1918; process of liquidation.—A corporation which is liquidating its affairs pursuant to orders of a creditors' committee in charge of the holding company, and in so doing engages solely in the disposition of its tangible investments as rapidly as mature judgment and the state of the market warrant, is not "carrying on or doing business" within the meaning of section 1000 (a) of the revenue act of 1918, imposing an excise tax on the capital stock of domestic corporations.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff. *Matthews & Trimble* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation organized and existing under the laws of the State of South Dakota and having its principal office at Mobile, Ala.

II. Plaintiff was incorporated October 23, 1906, and its charter was amended on August 26, 1908. Under its charter as amended it is authorized and empowered—

"to buy and otherwise acquire, lease, sell, mortgage, and otherwise dispose of and deal in lands and timber and interests therein; to manufacture and otherwise acquire, sell, and otherwise dispose of rosin, spirits of turpentine, and all

other wood and products and manufactures of wood; to buy, sell, and generally deal in merchandise of all kinds, all of which may be done anywhere in any State; and to exercise any and all powers conferred upon it by law"; and "to guarantee, buy, subscribe for, hold, sell, assign, transfer, hypothecate, pledge, and otherwise acquire and dispose of the stocks and bonds and other securities and evidences of debt or interest in other corporations, and, while owner of such stock, may exercise all the rights, powers, and privileges of ownership, including the right to vote thereon, whether such other corporation or corporations be incorporated in this State or not; but only so long and to such extent as such acts or powers are not violative of law."

Prior to December 31, 1917, plaintiff had its main office at New Orleans, La.; active business offices in Mobile, Ala.; Pensacola, Fla.; and Gulfport, Miss.; and maintained its statutory office in Pierre, S. Dak.

III. Prior to December 31, 1917, plaintiff was regularly engaged in business, being actively engaged in buying, holding, and selling improved and unimproved real estate; buying, holding, and selling timber; receiving and executing turpentine leases; borrowing and lending money; and buying, holding, and selling capital stock of other turpentine corporations.

Prior to December 31, 1917, plaintiff was a subsidiary of the Union Naval Stores Company, and all of its stock was owned by the latter company.

The Union Naval Stores Company was in the hands of a creditors' committee from 1913 until some time in 1917. In the latter part of 1917 the committee decided upon liquidation as of December 31, 1917, and disposed of all the assets of the Union Naval Stores Company, except its land and the stock of the Union Land & Timber Company (plaintiff), which it could not sell along with the other assets. At the same time, however, it ordered the Union Land & Timber Company (plaintiff) to cease doing business and to liquidate, and the stockholders of plaintiff proceeded to carry out these instructions.

IV. Pursuant to said determination to liquidate, plaintiff soon after December 31, 1917, discontinued all of its business offices except the one at Mobile, Ala., and discontinued all

of its business activities except the effort to dispose of its holdings; on March 14, 1918, it transferred all of the stocks it held in other corporations to the Union Naval Stores Company; E. C. Hughes was designated as president and his stenographer as secretary, with one share of stock standing in the name of each, with headquarters at Mobile, Ala., for the purpose of liquidating.

V. After December 31, 1917, plaintiff bought no lands, timber, turpentine leases, stocks in other corporations, nor property of any kind; it neither loaned nor borrowed any money; its officers' salaries and all other expenses were paid by the Union Naval Stores Company by checks of the latter; plaintiff had no bank account and all proceeds from sale of assets passed immediately to the Naval Stores Company.

After December 31, 1917, the book records kept by plaintiff consisted of an itemized sales record showing all assets sold and a cash receipts book showing all cash received, which cash passed immediately to the Union Naval Stores Company.

VI. During the periods ending June 30, 1918, 1919, 1920, and 1921, the plaintiff made sales of the following items:

Period	Land	Timber	Turpentine leases	Miscellaneous
1918	$50,058.23	$6,397.11	----------	$697.05
1919	46,603.90	62,743.40	$7,055.35	885.06
1920	43,666.03	867.50	8,476.46	380.17
1921	8,622.27	----------	2,390.72	72.05

During the above period plaintiff executed eight turpentine leases on its timberlands and was in the pursuit of profit in attempting to secure the best obtainable prices for said leases. The plaintiff also entertained competitive offers in attempting to dispose of its real-estate holdings at the most favorable prices, and sold 37 parcels of land which comprised a large portion of its holdings.

At the conclusion of the taxable period the plaintiff was engaged in disposing of its assets at the most favorable prices and after a period of ten years still retains a portion of its holdings.

VII. Pursuant to instructions from the collector of internal revenue for the district of Alabama, plaintiff on March 13, 1920, filed capital-stock tax returns for the years ended June 30, 1919, and 1920; likewise a capital-stock tax return for the year ended June 30, 1921, was filed on July 27, 1920, pursuant to instructions from said collector. All of said returns were filed under protest.

VIII. Thereafter the collector assessed capital-stock taxes and interest thereon against plaintiff as follows:

Year ended June 30—	Tax	Interest	Total
1919	$430.00	$21.50	$451.50
1920	431.00	21.55	452.55
1921	431.00		431.00
Total			1,335.05

Plaintiff paid under protest the 1919 and 1920 assessments, totaling $904.05, on December 15, 1920, and paid under protest the 1921 assessment of $431 on October 6, 1921.

IX. On February 7, 1922, plaintiff filed a refund claim on Form 46 with the Commissioner of Internal Revenue demanding refund of the aforesaid taxes. This refund claim is attached to the petition as "Exhibit A" and made a part hereof by reference.

The total of said taxes, amounting to $1,335.05, is still retained by the United States and the Commissioner of Internal Revenue refuses to refund any part of same.

The court decided that plaintiff was entitled to recover the sum of $1,335.05, with interest at the rate of 6 per cent per annum from October 6, 1921, until the date of judgment.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff is a South Dakota corporation, incorporated in 1906. Its charter was amended in 1908. Under its charter as amended it was authorized to engage in the following activities: "To buy and otherwise acquire, lease, sell, mortgage, and otherwise dispose of and deal in lands and timber, and interests therein; to manufacture and otherwise acquire, sell, and otherwise dispose of rosin, spirits of turpentine,

and all other wood and products and manufactures of wood; to buy, sell, and generally deal in merchandise of all kinds, all of which may be done anywhere in any State; and to exercise any and all powers conferred upon it by law"; and "to guarantee, buy, subscribe for, hold, sell, assign, transfer, hypothecate, pledge, and otherwise acquire and dispose of the stocks and bonds and other securities and evidences of debt or interest in other corporations, and while owner of such stock, may exercise all the rights, powers, and privileges of ownership, including the right to vote thereon, whether such other corporation or corporations be incorporated in this State or not; but only so long and to such extent as such acts or powers are not violative of law." The corporation engaged extensively in its authorized activities until December 31, 1917. Large tracts of land were acquired in the States of Louisiana, Mississippi, Alabama, and Florida, of over 100,000 acres, most of the same being what is known as turpentine lands. The corporation maintained offices in Mobile, Ala.; Pensacola, Fla.; Gulfport, Miss.; and Pierre, S. Dak., having its principal office at New Orleans, La. The primary purpose of its incorporation was as a subsidiary of the Union Naval Stores Company, a southern corporation, engaged in producing and acquiring turpentine lands. The Union Naval Stores Company owned practically all the outstanding shares of stock of the plaintiff corporation, except for a few necessary shares to qualify officials. In 1913 the Union Naval Stores Company became financially involved, and finally in 1917 sold and transferred through a creditors' committee all its assets, except its land and stock in the plaintiff company, to the New Orleans Naval Stores Company, a Louisiana corporation. Coincident with this transaction the Union Naval Stores Company and the plaintiff corporation resolved to liquidate, and in pursuance of such a resolution its activities were reduced to the necessities of liquidation. An office at Mobile, Ala., was continued by the president of the corporation, assisted by one stenographer, designated as secretary. All other officials were dispensed with; and sustained and continued efforts from that time on prevailed to realize the best possible price for the lands owned by the corporation. In the course of so

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dealing some turpentine leases, or rights to extract turpentine from turpentine trees, were let; and of course efforts were made to get the best possible price for the fee to the lands owned. If offers for the lands or turpentine rights were considered inadequate they were refused and more advanced prices sought. The progress of disposition has been tedious and delayed. To dispose advantageously for creditors of a large acreage of turpentine lands at a time when the markets were depressed and demand therefor seriously curtailed has involved years of time and effort, and though the majority of the lands and rights have been sold there still remain holdings undisposed of.

The Commissioner of Internal Revenue acting under section 1000 of the revenue act of 1918 (40 Stat. 1057, 1126) levied and collected from the plaintiff for the years 1919, 1920, and 1921 capital-stock taxes to the amount of $1,335.05, and it is for the recovery of this amount with interest that this suit is brought. No jurisdictional issue is involved.

Section 1000 (*supra*) reads as follows:

"Section 1000 (a). That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the revenue act of 1916, (1) every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 or so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000."

The commissioner justified the collection of the tax on the theory that the established facts characterize the plaintiff as a corporation "carrying on or doing business" within the intent and meaning of the statute.

A mere repetition of the application of the taxing act to varying conditions of fact, as reflected in numerous opinions of the courts, will serve no especial purpose. It is sufficient to observe that the issue is one of fact within the guiding principles of settled law. As said in the case of *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 516: "The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails, and doing only the acts necessary to continue

that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

We think this case comes squarely within the exception which exempts a liquidating corporation from the capital-stock tax. The defendant predicates a contrary opinion upon the fact that at times offers for lands were refused, and negotiations continued to obtain more; that turpentine rights were sometimes let, and finally that the inherent nature of the plaintiff's business was of necessity the doing of the very things it did do—*i. e.*, buy and sell land and turpentine rights, etc., for profit. The charter rights of the corporation disclose its purposes, and among them was the purchase and sale of lands and turpentine rights; but the continuance of these activities as a going concern, promoted for the purpose of paying dividends to its stockholders, and doing the same things to acquire sufficient funds to pay creditors are distinctly different. One contemplates the present and the future, looks toward an indefinite continuance of business activities. The other is predicated in this case largely upon the misfortunes of the past, and looks exclusively to a disposition to the best advantage of what the corporation has and discontinuing business. No business enterprise could discontinue advantageously without putting forth its best efforts to realize the greatest possible sum for its assets, and the mere fact that in the course of such a proceeding profits may at times be realized, though in this case none are proven, does not designate the transaction as "doing business" within the intent of the taxing act.

The plaintiff has not acquired additional lands, it has not paid dividends to stockholders, and all it has done is to dispose, as rapidly as mature judgment and the state of the market would warrant, of all of its tangible investments. Judgment will be awarded the plaintiff. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

MISSOURI SOUTHERN RAILROAD CO. v. THE UNITED STATES

[No. H-443. Decided April 2, 1928]

On Demurrer to Petition

Jurisdiction; Federal control of railroads; compensation; release; report of referees.—Where an agreement was entered into between the Director General and a railroad company, whose lines were taken under Federal control, releasing "the United States, the President, the Director General, or any agent or agency thereof by virtue of anything done or omitted," pursuant to the Federal control acts, and the company thereafter submitted to the Director General claims alleged to be due under the agreement, which were subsequently dismissed by the board of referees provided for in the Federal control act, on the ground that the agreement removed the asserted claims from their jurisdiction, the release so made discharged the United States from further liability and the claims so asserted were properly dismissed and furnish no ground for suit in the Court of Claims.

Same; suit on contract made under sec. 1, Federal control act.—When a contract is made between the Director General and a railroad company under section 1 of the Federal control act, suit or proceedings thereon is by section 206 of the act against the Director General, or the agent appointed by the President, in a district court or before the Interstate Commerce Commission, and this right of action is exclusively in those tribunals.

The Reporter's statement of the case:

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Messrs. George H. Parker and *Horace S. Whitman*, opposed.

The material allegations are stated in the opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The Missouri Southern Railroad Company, operating a short line road from Leeper to Bunker in the State of Missouri, filed its petition for the recovery of two items alleged to grow out of its agreement with the Director Gen-

eral of Railroads and one item claimed as compensation for the use of its property during a part of the period of Federal control. The Government has demurred to the petition, and upon the questions thus raised the case is before the court.

It appears from the petition that plaintiff is a common carrier and connects with the Missouri Pacific Railroad that was under Federal control; that plaintiff was taken under Federal control by virtue of the President's proclamation under the act of August 29, 1916, 39 Stat. 645, and of the Federal control act, 40 Stat. 451, and not relinquished from such control until some time in June, 1918, and that as provided for in the Federal control act an agreement was entered into between the Director General and the plaintiff, a copy of which is attached to the petition. It is alleged that plaintiff has submitted to the Director General a claim for sums due under the contract, but that he has refused to pay same and that plaintiff after such refusal made application for the appointment of referees, provided for in section 3 of the Federal control act, and that after their appointment the referees dismissed plaintiff's claim upon grounds stated in their report, a copy of which is attached to the petition. The principal reason for their action was that there was an agreement between the parties, and by its terms the asserted claim was taken out of their jurisdiction. This conclusion was based upon the case of *St. Louis, Kennett & Southeastern Railroad Co.* v. *United States*, 267 U. S. 346.

1. The item of claim of compensation for its road from January until June, 1918, is settled by the case just mentioned (267 U. S. 346). The contract there considered is the same in substance and effect as the contract in the instant case, section 3 (a) being as follows:

"Section 3 (a) The company accepts the terms and conditions of said Federal Control Act and the terms of this agreement, and expressly accepts the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which it now has or hereafter can have against the United States, the President, the Director General, or any agent or agency thereof by virtue of anything done or omitted, pursuant to the acts of Congress herein referred to. * * *"

Referring to this clause, the Supreme Court say:

"The language employed in section 3 to embody the agreement for settlement and release of claims is so clear and comprehensive as to leave on its face no room for construction."

The release was given effect when presented by demurrer.

2. The largest item of the claim is for what plaintiff describes as its proportion of certain joint rates, which it claims are due under the terms of its contract. Section 5 of the contract provides that all rates, fares, and charges for transportation services performed jointly by the company and any system operated by the Director General "shall be divided fairly between the Director General and the company" (plaintiff). The court's jurisdiction is challenged by the demurrer, the defendant insisting that under section 206 of the transportation act, 41 Stat. 461, this court has no cognizance of the claims. The plaintiff insists that this court has jurisdiction to grant relief under the provisions of the contract itself as a contract between plaintiff and the United States. In the absence of the agreement authorized by section 1 of the Federal control act provision is made by section 3 of that act for compensation and the procedure is stated. See *St. Louis, Kennett & Southeastern Railroad Co. case*, 58 C. Cls. 339, 340. When, however, an authorized agreement is made, the procedure under section 206 is to be against the Director General, or the agent appointed by the President, which action could be only in the District Court or before the Interstate Commerce Commission that is given jurisdiction by subsection (c). In the case of *Wyandotte Terminal Railroad Co.*, No. E–389, decided by this court December 5, 1927 (64 C. Cls. 329), and in which a writ of certiorari was denied by the Supreme Court, reliance was had upon section 204 of the transportation act. The court said that the right of action conferred by the statute was exclusive. We think the same is true here. It was not contemplated that suits growing out of such contracts by the Director General could be sued upon as obligations of the United States. The contract provides in section 7 that if differences arise as to any matter arising under it either party may refer the question to the Interstate Commerce Com-

mission, and that "its decision shall be final and binding." Provisions of this kind in Government contracts have been frequently enforced. See *Gleason case*, 175 U. S. 588; *Brinck case*, 53 C. Cls. 170, 177, and cases there cited.

What has been said disposes also of a small item which the Director General offered to pay and the plaintiff declined.

The demurrer will be sustained and the petition dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

FANNIE C. CURTIS, ELIZABETH R. CURTIS, AND MARY E. SMITH v. THE UNITED STATES

[No. E–368. Decided April 2, 1928]

On the Proofs

Eminent domain; act of July 1, 1918; just compensation; consequential damages; refusal to accept 75% of award; interest.—Where a portion of plaintiffs' land was taken under the act of July 1, 1918, just compensation is to be measured by the value of the portion taken together with consequential damages to the remainder, but does not include interest on the percentage which they could have accepted, viz, 75 per cent of the award by the President.

The Reporter's statement of the case:

Mr. Allan D. Jones for the plaintiffs. *Mr. George Nelms Wise* was on the brief.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs are citizens of the United States, residing in Warwick County, State of Virginia, and have at all times borne true and loyal allegiance to the Government of the United States.

II. On September 7, 1918, the mother of plaintiffs was sole owner of the following described real estate, with all rights, privileges, and appurtenances thereunto belonging or appertaining:

All that certain tract of land situate on the old County Road leading to Halstead's Point, near Lebanon Church, and containing 170 acres, more or less. The said tract of land is crossed by the right of way for the railroad track running into the Navy Mine Depot at Yorktown, Virginia, the fee simple of which right of way was commandeered by the Government, the said right of way being numbered 299 and containing 3.28 acres, as shown on map of the Navy Mine Depot, Yorktown, Virginia, dated March 22, 1920. The said right of way falls within the boundaries of the property formerly owned by Maria E. Curtis, mother of plaintiffs, and by her will devised to plaintiffs. No division of the property has been made among the plaintiffs.

Under the will of their mother plaintiffs became entitled to the whole tract of land and the compensation provided for in the act of Congress hereinafter mentioned.

III. Of the aforesaid tract there was taken by the President of the United States for the United States, under proclamation of August 7, 1918, pursuant to act of Congress approved July 1, 1918 (Public, No. 182, 65th Congress), said 3.28 acres, and the same passed into the possession and control of the United States September 7, 1918. By reason of said taking 4.1 acres of the remainder of plaintiffs' land were damaged, being a triangular area on the County Road separated by the right of way from the main tract.

IV. The reasonable market value of plaintiffs' 3.28 acres of land so taken by the Government was, on the 7th day of September, 1918, $330. The damage by reason of said taking to the said 4.1 acres of the remainder of plaintiffs' land was $150.

V. The President of the United States determined that the just compensation for the land taken as aforesaid was $330, and approved the findings of the Board of Valuation of Commandeered Property of the Navy Department, before whom plaintiffs had presented their claim for just compensation, awarding them that amount. The amount so awarded and determined was unsatisfactory to plaintiffs, and plaintiffs declined to accept the same or any part thereof.

The court decided that plaintiffs were entitled to recover $480, with interest on $232.50 from September 7, 1918, until judgment is paid.

MOSS, *Judge*, delivered the opinion of the court:

Under the provisions of an act of Congress of July 1, 1918, 40 Stat. 704, 722, the President of the United States, by proclamation dated August 7, 1918, took title to and authorized the Secretary of the Navy to take possession of a certain tract of land in York County, Virginia, containing 11,433 acres, with all riparian rights, privileges, easements, and other rights for the purpose of establishing a naval mine depot. As a part of and in connection with the use of said naval mine depot a railroad was constructed from the main line of the Chesapeake & Ohio Railroad into the naval mine depot over the lands of plaintiffs' 170-acre tract, consisting of 3.28 acres of land. The railroad and right of way separated from the larger body of land a small triangular area containing 4.1 acres situated on the County Road.

Under the provisions of said proclamation plaintiffs presented to the Board of Valuation of Commandeered Property of the Navy Department a claim for just compensation, and was awarded the sum of $330, which plaintiffs declined to accept. Plaintiffs also elected not to avail themselves of the right to receive 75 per centum thereof. This suit is for the recovery of $3,500, $1,000 of which plaintiffs claim as just compensation for the land actually taken, and $2,500 is for consequential damages to the remainder of the tract. While defendant directs the attention of the court to the case of *Transportation Company* v. *Chicago*, 99 U. S. 640, as authority for the denial of plaintiffs' right to recover consequential damages to the remainder of the tract resulting from the actual taking of a portion thereof, the court is of the opinion that such damage constitutes a proper element in determining just compensation in this case. *United States* v. *Grizzard*, 219 U. S. 180, 183; *United States* v. *Welch*, 217 U. S. 333, 339; *Campbell* v. *United States*, 266 U. S. 368, 369; see also *Sharp* v. *United States*, 191 U. S. 341.

The court has found the value of the 3.28 acres of land taken for the right of way to be $330 as of the date of Sep-

tember 7, 1918. Incident to the taking of the strip for the railroad right of way plaintiffs are entitled to recover for the damage to the triangular area of 4.1 acres. The court has found such damage to be $150. The evidence is not sufficient to justify a recovery for damage to the main body of the land. Having declined to accept the award, plaintiffs are not entitled to recover interest on $247.50 of the judgment herein. *Pope* v. *United States*, 61 C. Cls. 974.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

WILLIAM G. DU BOSE, ADMINISTRATOR OF THE ESTATE OF ROBERT T. JASPER, DECEASED, v. THE UNITED STATES

[No. E-596. Decided April 2, 1928]

On the Proofs

Retired pay, Navy; sec. 11, act of March 3, 1899, res adjudicata.—Where a commander of the Navy, retired as such September 21, 1899, sued the United States for the retired pay of a captain under section 11 of the act of March 3, 1899, and the Court of Claims decided adversely to his claim, from which decision no appeal was taken, the judgment of the court is *res adjudicata* against his right to such pay.

Same; retroactive promotion after retirement.—A commission issued by the President September 25, 1925, raising a commander of the Navy, retired as such September 21, 1899, to the rank of captain, effective as of the date of retirement, did not, in the absence of a clear intention on the part of Congress to do so, create a liability on the part of the United States for the corresponding increase in pay.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Frank J. Keating* was on the brief.

The court made special findings of fact, as follows:

I. William G. Du Bose, the plaintiff, is administrator of the estate of Robert T. Jasper, who was an officer on the retired list of the United States Navy and a resident of the District of Columbia at the time of his death, February 16, 1926.

The decedent entered the United States Navy as a midshipman at the Naval Academy on July 21, 1864, where he remained until June 2, 1868, when his course of instruction was completed. He was promoted to ensign on April 19, 1869; to master (now styled lieutenant, junior grade), July 12, 1870; to lieutenant, October 27, 1872; to lieutenant commander, July 4, 1893, and to commander, March 3, 1899. He remained a commander until September 21, 1899, when he was retired from active service, and from that time to the date of his death he was an officer of the Navy on the retired list.

II. At the time of his appointment as midshipman July 21, 1864, and thereafter during a part of the period when he was serving as a midshipman at the Naval Academy the Civil War was in progress.

III. The cause of decedent's retirement was physical incapacity incident to active service. His record was at all times creditable.

IV. From the date of his retirement, September 21, 1899, until the date of his death he received pay only as a commander on the retired list.

V. At the time of retirement he claimed the benefit of section 11 of the Navy personnel act approved March 3, 1899, 30 Stat. 1007:

"That any officer of the Navy, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

VI. He thereafter sued in this court for pay as a captain, United States Navy, retired, since September 21, 1899, less all pay previously paid him as a commander. His petition was dismissed, as was also a subsequent suit.

VII. After the decision of the Supreme Court in the case of Rear Admiral Jefferson F. Moser was announced Novem-

ber 17, 1924, 266 U. S. 236, affirming 58 C. Cls. 164, the decedent made application to the Secretary of the Navy for a commission as captain on the retired list, to rank as such from September 21, 1899.

On advice of the Judge Advocate General of the Navy the Secretary of the Navy recommended to the President the issuance of the commission, and said commission was issued by the President on September 15, 1925, effective as of September 21, 1899.

VIII. The plaintiff therefore claims for decedent's estate $9,369.80, the pay of Robert T. Jasper, as captain on the retired list from September 21, 1899, to the date of his death. This claim was submitted to the General Accounting Office and disallowed.

IX. This claim is made under and depends upon the following, among other, provisions of statute:

Act of July 16, 1862, ch. 183, secs. 1, 11, and 15, 12 Stat. 583, 585, 586, providing that midshipmen are line officers on the active list of the United States Navy, and fixing their status and pay.

Revised Statutes, sec. 1261, fixing the pay of a colonel at $3,500 and of a lieutenant colonel at $3,000 a year.

Revised Statutes, sec. 1262, providing 10 per cent increase for each five years' service.

Revised Statutes, sec. 1263, providing that the increase shall not exceed 40 per cent of the yearly pay of the grade.

Revised Statutes, sec. 1267, providing that the pay of a colonel shall not exceed $4,500 a year, or the pay of a lieutenant colonel $4,000.

Revised Statutes, sec. 1453, providing for the retirement of officers from active service on account of incapacity incident to the service.

Revised Statutes, sec. 1466, providing that a captain in the Navy shall rank with a colonel in the Army and a commander in the Navy with a lieutenant colonel in the Army.

Revised Statutes, sec. 1556, fixing the sea pay of a captain at $4,500 a year and of a commander at $3,500 a year.

Revised Statutes, sec. 1588, providing that all officers of the Navy retired on account of incapacity resulting from

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long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall receive 75 per cent of their sea pay.

Act of March 3, 1899, ch. 413, sec. 11, 30 Stat. 1007, providing:

"That any officer of the Navy with a creditable record who served during the Civil War shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

Section 13, providing that commissioned officers of the line of the Navy shall receive the same pay and allowances as officers of corresponding rank in the Army.

Act of June 29, 1906, ch. 3590, 34 Stat. 554, which contains a provision for the benefit of officers who were on the retired list at the date of the passage of that act.

Act of May 13, 1908, ch. 166, 35 Stat. 127, 128, fixing the rates of pay of captain and commander, respectively, in the Navy, and providing that those rates should apply to officers already on the retired list.

Act of March 3, 1909, ch. 255, 35 Stat. 753, providing that the act of 1906 shall not operate to deprive any officer of the Navy retired since its passage of the right to increased rank and pay, to which but for the passage of the act of 1906 he would have been entitled.

Act of March 4, 1911, ch. 266, 36 Stat. 1354, providing "that commissioned officers of the Army, Navy, and Marine Corps on the retired list whose rank has been or shall hereafter be advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such advanced rank."

Act of March 4, 1913, ch. 148, 37 Stat. 892, providing "that all officers of the Navy who, since the 3d day of March, 1899, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions."

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Robert T. Jasper was a commander on the retired list of the United States Navy at the time of his death, February 16, 1926. He was retired because of physical incapacity incident to active service. His record was at all times creditable. At the time of his retirement he claimed the benefit of section 11 of the Navy personnel act, approved March 3, 1899 (30 Stat. 1007), which is as follows:

"That any officer of the Navy, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

He thereafter sued in this court for pay as a captain from the date of his retirement, September 21, 1899, less all pay received by him from that date as a commander. His petition was dismissed, as was also a subsequent suit. After the decision of the Supreme Court in the case of *United States* v. *Moser*, 266 U. S. 236, decedent applied to the Secretary of the Navy for a commission as captain on the retired list, to date from September 21, 1899. On the recommendation of the Secretary, the President appointed the decedent a captain in the Navy, retired, effective September 21, 1899. The plaintiff therefore sues for $9,369.80, the amount which he claims is due the estate of Robert T. Jasper on account of his advance to the grade of captain.

The opinion of the Judge Advocate General, upon which this appointment was based, held that, inasmuch as the Supreme Court in the *Moser case, supra*, ruled that Moser's right to the pay of a retired rear admiral was *res judicata* by reason of previous decisions of this court, Jasper's right to increase in pay appeared to be concluded by reason of the adverse decision of this court in 43 C. Cls. 368. In this view of the matter we concur. The opinion states:

"No appeal was taken in the *Jasper case*, so that the Court of Claims' decision adverse to his claim would now appear to be conclusive against his right to the pay of the next higher grade upon the principle of the Supreme Court's decision that the judgment of the Court of Claims in the *Moser case* was *res judicata* in favor of that officer's right to increased pay."

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The opinion further states: "The question now presented in *Jasper's* case is one of rank, not pay," and that as the department's decision in favor of Moser's advancement in rank was applied to Rear Admiral Davenport—

"It should likewise be applied to Commander Jasper's application for advancement in rank, leaving the question of his pay to be determined by the accounting officers or the court."

It is clear, therefore, that the Judge Advocate General's office attempted to pass upon the question only of the right to advancement in rank and not in pay, and was of the opinion that the advancement in rank under the circumstances did not carry an increase in pay owing to the previous decisions of this court against the decedent's right to the pay of a captain.

The facts contained in the record in this case and upon which the right to recover is based have been four times before this court in the following cases: *Jasper* v. *United States*, 38 C. Cls. 202, 40 C. Cls. 76, 43 C. Cls. 368, and 52 C. Cls. 521. All of these cases were decided adversely to Jasper on the facts as presented in this case except one fact, namely, the issuance to the decedent by the President, upon the recommendation of the Secretary of the Navy on September 15, 1925, of the commission of captain in the Navy, retired, as of September 21, 1899; that is, the appointment was issued in 1925 and effective in 1899. We have, therefore, the question as to the authority of the President to make the retroactive appointment, and, granting this authority, whether the appointment did anything more than establish the rank of the decedent. An increase in pay does not necessarily follow a promotion in rank. They are not dependent upon each other but upon the statutes, which may confer advance in rank without increase in pay or increase in pay without advance in rank. The previous decisions of this court being adverse to decedent's right to the pay of a retired captain concluded the question in the negative. Even if the President had authority to make the retroactive appointment by the order of September 15, 1925, the order would not change decedent's status as to pay. The determining facts in this case are the same as in the cases heretofore decided

against decedent, and are not altered by the action of the President in promoting the decedent to captain on the retired list. It would seem unnecessary, therefore, to pass upon the question of the authority of the President to make a retroactive appointment. No statutory authority therefor has been shown. The opinion of the Judge Advocate General advising the promotion of decedent is based upon section 11 of the act of March 3, 1899, 30 Stat. 1007, *supra*. This act does not in terms authorize a retroactive appointment. It provided only for the rank and pay an officer shall receive when retired. It does not authorize the promotion of an officer already on the retired list. When the decedent was retired, his status as to rank and pay was fixed (*Moser* v. *United States*, 58 C. Cls. 164, 166; 266 U. S. 236), and no authority under which he could thereafter be advanced has been shown.

The act of July 1, 1918, 40 Stat. 717, permitting the promotion of naval officers on the retired list who were called into service during the World War, does not apply here, as Jasper was not called into service during that war and did not serve.

A statute giving authority to appoint to office will not be taken as authority to make a retroactive appointment unless it clearly appears from the language of the statute that this was the intention of Congress. *Kilburn* v. *United States*, 15 C. Cls. 41, 47; *Collins* v. *United States*, 15 C. Cls. 22, 34; and *Bennett* v. *United States*, 19 C. Cls. 379, 386.

There is nothing in section 11 of the act of March 3, 1899, *supra*, to indicate such an intention. In construing a statute the intention of Congress is in a measure to be ascertained by what it fails to say as well as by what it says: There should be clear authority of law for antedating a commission which, as claimed here, carries with it an additional expenditure of money by the Treasury. There is no authority under the Constitution for an executive officer to create Government liabilities where there has been no authority given by Congress. But, as stated, whether or not there was authority to make this appointment, it could not have the effect of increasing the pay of the decedent.

The plaintiff is not entitled to recover and his petition should be dismissed. It is so ordered.

Moss, *Judge;* Booth, *Judge;* and Campbell, *Chief Justice*, concur.

METROPOLITAN LIFE INSURANCE CO. v. THE UNITED STATES

[No. E-419. Decided April 2, 1928]

On the Proofs

Excise tax; carrying on or doing business; sec. 1000 (c), revenue act of 1918; mutual insurance companies; ascertainment of surplus and reserves; finding by Commissioner of Internal Revenue.—In ascertaining the sum of its surplus or contingent reserves and of certain other reserves, taxable under section 1000 (c) of the revenue act of 1918, the market value, as of the close of the period designated by statute, of securities held by a mutual insurance company, representing actual sales and bid and asked prices, reflects the value of said sum for tax purposes, and the Commissioner of Internal Revenue, who was under obligation to take into consideration every relevant fact, was not authorized to make his assessment on the basis of an average value over an arbitrary period of time.

The Reporter's statement of the case:

Mr. Leroy A. Lincoln for the plaintiff. *Mr. Frederic G. Dunham* was on the briefs.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Metropolitan Life Insurance Company is and was in the years 1917, 1918, and 1920 a mutual life insurance corporation organized and existing under the laws of the State of New York and having its principal office and place of business at 1 Madison Avenue, Borough of Manhattan, city of New York.

Capital-Stock Tax, Period Ending June 30, 1919

II. The Metropolitan Life Insurance Company on or about September 26th, 1918, duly filed its capital-stock tax return for the year ending June 30th, 1919, based on the surplus of the company as of December 31st, 1917.

III. The plaintiff on or about December 24th, 1919, duly filed an amended capital-stock tax return for the year ending June 30th, 1919, based on the surplus of the company as of December 31st, 1917.

IV. The Commissioner of Internal Revenue by his deputy, James Hageman, jr., on or about January 24th, 1920, made an assessment of the capital-stock tax of the said company on the basis of said original and amended returns.

V. The plaintiff on or about February 24th, 1920, duly made claim for abatement of said tax in a letter.

VI. The Commissioner of Internal Revenue adjusted such claim for abatement and made final assessment of said capital-stock tax in the sum of $21,888.45.

VII. Notice and demand for said tax signed by William H. Edwards, collector of internal revenue, under date of February 16th, 1920, was given to said company under which tax in the sum of $21,888.45 was claimed.

VIII. The plaintiff duly paid said tax in the sum of $21,888.45, by its check dated February 24th, 1920, to the order of the collector of internal revenue.

IX. The plaintiff duly filed its claim for refund on Treasury Department Form 843, verified January 11, 1923, claiming refund of the said sum of $21,888.45.

X. The claim for refund in the sum of $21,888.45 was rejected by the Commissioner of Internal Revenue.

XI. The final assessment of the capital-stock tax of said company for the taxable period ending June 30th, 1919, was made by the Commissioner of Internal Revenue in a statement accompanying a letter signed R. M. Estes, Deputy Commissioner, with which said claim for refund in the sum of $21,888.45 was disallowed.

XII. In making such finding the Commissioner of Internal Revenue asserted that the values of the securities, stocks, and bonds, owned by the plaintiff and set forth in

Schedule D of its annual statement for December 31st, 1917, were obtained by reference to a book published by the National Convention of Insurance Commissioners and entitled, "List of Securities held by Insurance Companies with Valuations to be used in the Companies' Annual Statements as of December 31, 1917."

XIII. The said "List of Securities Held by Insurance Companies," etc., recited in the introduction thereto that the values to be published in the said book were to be prepared by adding together the market values as of November 1, 1916, February 1, May 1, August 1, and November 1, 1917, dividing them by five.

XIV. The introduction to the book entitled "List of Securities Held by Insurance Companies," etc., begins as follows:

"The National Convention of Insurance Commissioners at its annual meeting in St. Paul, Minnesota, on August 30, 1917, recognized the probability that the participation of the United States in the World War would affect the bond and stock markets to such an extent that market quotations on any fixed date would not represent the real values on standard securities, and adopted the following resolution:

"'*Resolved*, That the Committee on Valuations be authorized to make a contract for the publication of the book on valuations, and that it also be authorized to arrive at the valuations by such method as within the opinion of the committee is proper.'"

The last paragraph of the said introduction is as follows:

"The committee wishes to caution the general public against the use of this book as a guide for investors, or for the purpose of assisting in the sale or disposal of any securities. Its use by any brokerage firm or security salesman in a prospectus or otherwise, to assist in the sale of any security, will be unauthorized and improper. Its sole purpose is to facilitate the valuation of the stocks and bonds held by insurance companies on a fair and uniform basis, and for that purpose it is believed by the committee to be well adapted."

XV. The statement accompanying the findings of the Commissioner of Internal Revenue showed, among other deductions from the assets of the company for the purpose of determining the amount subject to tax, a deduction of

$15,264,492.51 as being "difference between book and market values of stocks and bonds shown under Schedule 'D.'"

XVI. The difference between the book and market values of stocks and bonds shown under said Schedule D, according to reference to the Commercial and Financial Chronicle, which is an accepted market report of sales and of bid and asked prices on stocks and bonds dealt in on the New York and other stock exchanges and dealt in "over the counter," was $30,017,528.26.

XVII. The total deduction from the company's assets in order to find the amount subject to tax for said taxable year ending June 30, 1919, was, according to the Commissioner of Internal Revenue, $676,311,836.33, leaving a taxable value of $27,713,678.98, while the total deduction according to the contention of the company, by using the difference between book and market value of stocks and bonds shown under said Schedule D, according to quotations stated in the said Commercial and Financial Chronicle, was $691,064,872.08, leaving an amount subject to taxation, according to the same formula, of $12,960,643.23. The tax at $1.00 for each full $1,000, according to the method used by the Commissioner of Internal Revenue, was $27,708, whereas the tax arrived at, by using the market quotations from the Commercial and Financial Chronicle, according to the contention of the plaintiff and upon the same formula, was $12,956. The plaintiff had previously paid $21,888.45 and, according to its contention, has overpaid such tax in the sum of $8,932.

XVIII. The valuations of the plaintiff's securities arrived at by reference to plaintiff's exhibit, known as the List of Securities Held by Insurance Companies, were required to be included in the annual report of the company by reason of the laws of the State of New York and the rulings and requirements of the superintendent of insurance of the State of New York thereunder. The said values were not used by the plaintiff for any purpose except as herein stated, either with respect to any form of State or Federal taxation or with respect to establishing the solvency of the plaintiff company.

XIX. The National Convention of Insurance Commissioners, the organization under whose direction said exhibit

was prepared, is an association of the insurance supervising officials of the different States of the United States, which association has, among other committees, a committee on blanks, which prepares the blank form of report for use by insurance companies in all States, and a committee on valuations of securities, under whose direction the list of securities held by insurance companies are prepared.

XX. There is attached to these findings and made a part of such findings a comparative schedule entitled "Schedule 1," in which there are set forth in one column the computation of the said capital-stock tax for the period ending June 30, 1919, according to the commissioner's determination, upon his formula as set forth in plaintiff's exhibit, and in the parallel column the computation of the capital-stock tax of the plaintiff for the same year, upon the same formula as used by the commissioner, but with a change in the item of "difference between book and market values of stocks and bonds shown under Schedule D" and with the corresponding change in the resultant figures.

Capital-Stock Tax, Period Ending June 30, 1920

XXI. The Metropolitan Life Insurance Company on or about July 18, 1919, duly filed its capital-stock tax return for the year ending June 30, 1920, based on the surplus of the company as of December 31st, 1918.

XXII. The plaintiff duly paid the tax assessed for the period ending June 30, 1920, by its check dated December 2, 1919, to the order of the collector of internal revenue.

XXIII. The plaintiff duly filed its claim for refund on Treasury Department Form 843, verified January 11, 1923, claiming refund of the said sum of $27,043.

XXIV. The said claim for refund in the sum of $27,043 was granted by the Commissioner of Internal Revenue to the extent of $16,452 and was rejected to the extent of $10,591.

XXV. The final assessment of the capital-stock tax of said company for the taxable period ending June 30, 1920, was made by the Commissioner of Internal Revenue in a statement accompanying a letter signed R. M. Estes, deputy commissioner, with which said claim for refund in the sum

of $27,043 was allowed in the sum of $16,452 and was rejected in the sum of $10,591.

XXVI. In making such finding the Commissioner of Internal Revenue asserted that the values of the securities, stocks, and bonds owned by the plaintiff and set forth in Schedule D of its annual statement for December 31, 1918, were obtained by reference to a book published by the National Convention of Insurance Commissioners and entitled "List of Securities Held by Insurance Companies with Valuations to be used in the Companies' Annual Statements as of December 31, 1918," which book is in evidence.

XXVII. The said "List of Securities Held by Insurance Companies," etc., recited in the introduction thereto that the values to be published in the said book were to be prepared by adding to the values set forth in the last publication of the National Convention of Insurance Commissioners the actual market values as of November 30, 1918, and dividing the sum so obtained by two.

XXVIII. The final paragraph to the introduction of the plaintiff's Exhibit No. 17 is identical to the one which has been set out in Finding XIV hereof.

XXIX. The statement accompanying the findings of the Commissioner of Internal Revenue showed, among other deductions from the assets of the company for the purpose of determining the amount subject to tax, a deduction of $20,631,602.40 as being "difference between book and market values of stocks and bonds shown under Schedule D."

XXX. The difference between the book and market values of stocks and bonds shown under said Schedule D, according to reference to the said Commercial and Financial Chronicle, which is an accepted market report of sales and of bid and asked prices on stocks and bonds dealt in on the New York and other stock exchanges and which were dealt in "over the counter," is $30,265,531.15.

XXXI. The total deduction from the company's assets in order to find the amount subject to tax for said taxable year ending June 30, 1920, was, according to the Commissioner of Internal Revenue, $764,858,144.73, leaving a taxable value of $10,596,553.55, while the total deduction according to the convention of the company, by using the difference between

book and market value of stocks and bonds shown under said Schedule D, according to quotations stated in the said Commercial and Financial Chronicle, was $774,492,073.48, leaving an amount subject to tax, according to the same formula, of $962,624.80. The tax at $1.00 for each full $1,000, according to the method used by the Commissioner of Internal Revenue, was $10,591, whereas the tax arrived at, by using the market quotations from the Commercial and Financial Chronicle, according to the contention of the plaintiff and upon the same formula, was $958. The plaintiff had previously paid $27,043 and had been allowed under the assessment contained in plaintiff's Exhibit No. 5 a refund in the sum of $16,452, and therefore, according to its contention, has overpaid such tax in the sum of $9,753.

XXXII. The valuations of the plaintiff's securities arrived at by reference to the List of Securities Held by Insurance Companies were required to be included in the annual report of the company by reason of the laws of the State of New York and the rulings and requirements of the superintendent of insurance of the State of New York thereunder. The said values were not used by the plaintiff for any purpose except as herein stated either with respect to any form of State or Federal taxation or with respect to establishing the solvency of the plaintiff company.

XXXIII. The National Convention of Insurance Commissioners, the organization under whose direction said exhibit was prepared, is an association of the insurance supervising officials of the different States of the United States, which association has, among other committees, a Committee on Blanks, which prepares the blank form of report for use by insurance companies in all States, and a Committee on Valuations of Securities, under whose direction the list of securities held by insurance companies is prepared.

XXXIV. There is attached to these findings, and made a part of such findings, a comparative schedule, entitled "Schedule 2," in which there are set forth in one column the computation of the said capital-stock tax for the period ending June 30, 1920, according to the commissioner's determination, upon his formula, and in the parallel column the computation of the capital-stock tax of the plaintiff for

the same year, upon the same formula as used by the commissioner, but with a change in the item of "difference between book and market values of stocks and bonds shown under Schedule D" and with the corresponding change in the resultant figures.

Capital-Stock Tax, Period Ending June 30, 1922

XXXV. The Metropolitan Life Insurance Company, on or about July 27th, 1921, duly filed its capital-stock tax return for the year ending June 30th, 1922, based on the surplus of the company as of December 31st, 1920.

XXXVI. The collector of internal revenue, on or about September 2, 1921, gave notice and made demand for the capital-stock tax for the period ending June 30, 1922, calling for a payment of tax in the sum of $5,191, which demand was dated September 2, 1921.

XXXVII. The company duly paid said tax in the sum of $5,191 by its check dated September 7, 1921, payable to the order of the collector of internal revenue.

XXXVIII. The company duly filed its claim for refund on Treasury Department Form 843, verified January 11, 1923, claiming refund of the said sum of $5,191.

XXXIX. The claim for refund in the sum of $5,191 was allowed by the Commissioner of Internal Revenue to extent of $2,245, and was rejected by the Commissioner of Internal Revenue in the sum of $2,946.

XL. The final assessment of the capital-stock tax of said company for the taxable period ending June 30th, 1922, was made by the Commissioner of Internal Revenue in a statement accompanying a letter signed R. M. Estes, Deputy Commissioner, with which said claim for refund in the sum of $5,191 was allowed in the sum of $2,245, and was rejected in the sum of $2,946.

XLI. In making such finding the Commissioner of Internal Revenue asserted that the values of the securities, stocks, and bonds owned by the plaintiff and set forth in Schedule D of its annual statement for December 31, 1920, were obtained by reference to a book published by the National Convention of Insurance Commissioners and entitled "List

of Securities Held by Insurance Companies with Valuations to be used in the Companies' Annual Statements as of December 31st, 1920," which book is in evidence.

XLII. The "List of Securities Held by Insurance Companies," etc., recited in the introduction thereto that the values to be published in the said book were to be prepared by adding to the values set forth in the last publication of the National Convention of Insurance Commissioners the market values as of November 1, 1920, and dividing the sum so obtained by two.

XLIII. The introduction to the plaintiff's exhibit again closed with the paragraph which has been fully set out in Finding XIV hereof.

XLIV. The statement accompanying the findings of the Commissioner of Internal Revenue showed, among other deductions from the assets of the company for the purpose of determining the amount subject to tax, a deduction of $42,986,312.60 as being "difference between book and market values of stocks and bonds shown under Schedule D."

XLV. The difference between the book and market values of stocks and bonds shown under said Schedule D, according to reference to the Commercial and Financial Chronicle, which is found to be an accepted market report of sales and of bid and asked prices on stocks and bonds dealt in on the New York and other stock exchanges and which were dealt in "over the counter," was $77,273,747.19.

XLVI. The total deduction from the company's assets, in order to find the amount subject to tax for said taxable year ending June 30, 1922, was, according to the Commissioner of Internal Revenue, $977,961,281.46, leaving a taxable value of $2,951,805.71; while the total deduction according to the contention of the company, by using the difference between book and market value of stocks and bonds shown under said Schedule D, according to quotations stated in the Commercial and Financial Chronicle, was $1,012,248,716.35, leaving an amount subject to taxation, according to the same formula, of nothing. The tax at $1.00 for each full $1,000, according to the method used by the Commissioner of Internal Revenue, was $2,946, whereas the tax arrived at, by using the market quotations from the Commercial and

Financial Chronicle, according to the contention of the company and upon the same formula, was nothing. The company had previously paid $5,191, and the company's claim for refund thereof had been previously allowed to the extent of $2,245, and therefore, according to its contention, it has overpaid such tax in the sum of $2,946.

XLVII. The valuations of the plaintiff's securities arrived at by reference to plaintiff's exhibit known as the List of Securities Held by Insurance Companies, were required to be included in the annual report of the company by reason of the laws of the State of New York and the rulings and requirements of the superintendent of insurance of the State of New York thereunder, and said values are not used by said company for any purpose whatsoever, either with respect to any form of State or Federal taxation or with respect to establishing the solvency of the said company.

XLVIII. The National Convention of Insurance Commissioners, the organization under whose direction said exhibit was prepared, is an association of the insurance supervising officials of the different States of the United States, which association has, among other committees, a Committee on Blanks, which prepares the blank form of report for use by insurance companies in all States, and a Committee on Valuation of Securities, under whose direction the list of securities held by insurance companies is prepared.

XLIX. There is attached to these findings and made a part of such findings a comparative schedule, entitled "Schedule 3," in which there are set forth in one column the computation of the said capital-stock tax for the period ending June 30, 1922, according to the commissioner's determination, upon his formula as set forth in plaintiff's Exhibit No. 5, and in the parallel column the computation of the capital-stock tax of the plaintiff for the same year, upon the same formula as used by the commissioner, but with a change in the item of "difference between book and market values of stocks and bonds shown under Schedule D" and with the corresponding change in the resultant figures.

Reporter's Statement of the Case

SCHEDULE 1

Figures as of December 31, 1917 (for determination of capital-stock tax for period ending June 30, 1919)

	Commissioner's determination		Taxpayer's contention	
Total admitted assets		$704, 025, 515. 31		$704, 025, 515. 31
Deductions, liabilities:				
Item 7	$644, 603, 968. 00		$644, 603, 968. 00	
Item 8	321, 323. 52		321, 323. 52	
Item 8A	500, 000. 00		500, 000. 00	
Item 9	701, 825. 54		701, 825. 54	
Total	646, 127, 117. 06		646, 127, 117. 06	
Items 10 to 33, inclusive	8, 393, 611. 29		8, 393, 611. 29	
Item 34	1, 199, 309. 16		1, 199, 309. 16	
Items 39, 40, 43, 44, 45, 45A	5, 327, 306. 31		5, 327, 306. 31	
Difference between book and market values of stocks and bonds shown under Schedule D	15, 264, 492. 51		30, 017, 528. 26	
		676, 311, 836. 33		691, 064, 872. 08
Taxable value		27, 713, 678. 98		12, 960, 643. 23
Deduction allowed by law		5, 000. 00		5, 000. 00
Fair value on excess of $5,000		27, 708, 678. 98		12, 955, 640. 23
Tax at $1 for each full $1,000		27, 708. 00		12, 956. 00
Tax previously assessed		21, 888. 00		21, 888. 00
Additional assessment (not contemplated)		5, 820. 00	Amt. overpaid	8, 932. 00

Metropolitan Life Insurance Company.

SCHEDULE 2

Figures as of December 31, 1918 (for determination of capital-stock tax for period ending June 30, 1920)

	Commissioner's determination		Taxpayer's contention	
Total admitted assets		$775, 454, 698. 28		$775, 454, 698. 28
Deductions, liabilities:				
Items 7, 8, 8A, and 9	$722, 066, 635. 64		$722, 066, 635. 64	
Items 10 to 33, inclusive	18, 353, 861. 79		18, 353, 861. 79	
Item 34	1, 679, 735. 81		1, 679, 735. 81	
Items 39, 40, 43, 44, 45, 46	2, 126, 309. 09		2, 126, 309. 09	
Difference between book and market values of stocks and bonds shown under Schedule D	20, 631, 602. 40		30, 265, 531. 15	
		764, 858, 144. 73		774, 492, 073. 48
Taxable value		10, 596, 553. 55		962, 624. 80
Deduction allowed by law		5, 000. 00		5, 000. 00
Fair value on excess of $5,000		10, 591, 553. 55		957, 624. 80
Tax at $1 for each full $1,000		10, 591. 00 (Should be 10, 711. 00)		958. 00
Tax previously assessed		27, 043. 00		26, 085. 00
Excess assessment		16, 452. 00 (Should be 16, 332. 00)	Amt. overpaid	9, 753. 00

Metropolitan Life Insurance Company.

Opinion of the Court

SCHEDULE 3

Figures as of December 31, 1920 (for determination of capital-stock tax for period ending June 30, 1922)

	Commissioner's determination		Taxpayer's contention	
Total admitted assets		$980,913,087.17		$980,913,087.17
Deductions, liabilities:				
Items 7, 8, 8A, 9	$919,339,826.14		$919,339,826.14	
Items 10 to 33, inclusive	13,552,263.99		13,552,263.99	
Item 34	747,435.17		747,435.17	
Items 40, 43, 44, 45, 46	1,335,443.86		1,335,443.86	
Difference between book and market values of stocks and bonds shown on Schedule D	42,986,312.60		77,273,747.19	
		977,961,281.46		1,012,248,716.35
Taxable value		2,951,805.71		
Deduction allowed by law		5,000.00		5,000.00
Fair values on excess of $5,000		2,946,805.71		0
Tax at $1 for each full $1,000		2,946.00		0
Tax previously assessed		5,191.00		5,191.00
Excess assessment		2,245.00		5,191.00
			Amt. overpaid	2,946.00

Metropolitan Life Insurance Company.

The court decided that plaintiff was entitled to recover $21,631.00, with interest at 6 per cent per annum on a part thereof, $8,932.00, from February 24, 1920, to April 2, 1928; on $9,753.00, another part thereof, from December 2, 1919, to April 2, 1928; and on $2,946.00, another part thereof, from September 8, 1921, to April 2, 1928, the date of judgment.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The Metropolitan Life Insurance Company, a mutual life insurance company, sues to recover taxes it was required to pay and which the Commissioner of Internal Revenue refused to refund for the taxable years 1919, 1920, and 1922.

By section 1000 of the revenue act of 1918, 40 Stat. 1126, there was imposed on every domestic corporation annually, "a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock, the surplus and undivided profits shall be included."

"(c) * * * The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II as of the close of the preceding accounting period used by such company for purposes of making its income-tax return."

The issue involved is thus stated in behalf of the insurance company:

The method of determining the market value of these securities, which must be ascertained for the purpose of determining the amount of the company's surplus and reserve subject to this tax, is the only question at issue in this case.

For the defendant the issue is stated to be whether the company's stocks and bonds for capital-stock tax purposes under the act "shall be valued at the actual market values or at fair market values." Another feature is presented by the Government to be adverted to later.

The law as it was prior to this revenue act of 1918 had not provided a measure for the tax if applied to mutual insurance companies, but this act remedies the situation by section 1000, declaring in terms that the taxes imposed shall apply to mutual insurance companies, but it was necessary not only to declare the measure of the tax, but also to define, in case of these mutual companies, the character of property upon which the tax was imposed. In the case of a capital-stock company the tax was imposed "on the fair average value of its capital stock for the preceding year ending June 30." This would be inapplicable to a mutual company having no capital stock, and therefore the tax is imposed on designated surplus and reserves "as of the close of the preceding accounting period." In the one case the fair "average" value of the stock is to be ascertained and in the other case the value of its surplus and certain reserves as stated in the act is to be found. Another difference is noted in that the fair average value of the stock is to be ascertained for the preceding year ending June 30, while in the case of a mutual company the value shall be ascertained "as of the

close" of a stated period, in this case December 31. These distinctions must be observed because the law-making power has made them in a new statute "supplanting and changing the former statutes in many respects," and in which there is a significant change of phraseology. *Hecht* v. *Malley*, 265 U. S. 144, 156; *Ray Copper Co. case*, 268 U. S. 373, 376. In the latter case the commissioner was called upon to find the fair average value of the capital stock, and the court said (p. 377): "As the method to be pursued in ascertaining the value is not prescribed, we think that it was left to the sound judgment and discretion of the commissioner, subject only to the obligation to take into consideration every relevant fact." In the instant case the tax is upon "the sum" of the company's surplus or contingent reserves maintained for the general use of the business and certain other reserves, as of December 31 of a given year. In arriving at his values the commissioner adopted as a basis what is known as convention values. These were obtained from publications by the National Convention of Insurance Commissioners entitled "List of securities held by insurance companies," with valuations to be used in the companies' annual statements as of December 31. The findings show that the values as recited in the publication were to be prepared for 1917 by adding together the market values as of November 1, 1916, and February 1, May 1, August 1, and November 1, 1917, and dividing them by five. The convention values for 1918, it was stated, were to be prepared by adding to the values ascertained for 1917, the actual market values as of November 30, 1918, and dividing this sum by two. And the convention values for 1920 were determined by taking the values set forth in its last publication, adding thereto the market values as of November 1, 1920, and dividing this sum by two. This method, it is conceivable, could ascertain the average value of the securities over a definite period, and if the duty be confined to "the fair average value" relating to companies having capital stock, and the commissioner in his discretion used that method, a different question would be presented from that here involved. For some reason satisfactory to them, the Congress made a distinction between the two and required an ascertainment, in a class of cases, of the

sum of a surplus and certain reserves "as of the close" of a definite period.

To adopt a means that will not reflect this sum is to ignore the statute itself. In the publication used by the commissioner its authors expressly warned the general public against its use as a guide for investors, and manifestly the action of this National Convention of Insurance Commissioners, composed of insurance supervising officials of the several States, should not be of controlling effect. On the other hand, the insurance company complaining of the valuations adopted as stated has had recourse to prices reported and carried in a publication known as the Commercial and Financial Chronicle, current on or about December 31. According to the findings this publication is an accepted market report of sales and of bid and asked prices on stocks and bonds dealt in on the New York and other stock exchanges and dealt in "over the counter." It may be conceded that the commissioner in the exercise of "sound judgment and discretion" may have resorted to some other proof of value than this publication, but in the absence of some other applicable proof he may not disregard the only proof offered that was adapted to an ascertainment of the necessary facts. There was an obligation on him to take into consideration every relevant fact. *Ray Copper Co. case*, *supra*.

We are not impressed with the attempted distinction between "actual" market values and "fair" market values. We think that when the market value of the securities at the stated time is found, that amount reflects value for tax purposes. It has been said that as a rule the fair cash value of shares having a market is best ascertained by finding the price at which they sell in the market. See *National Bank of Commerce* v. *City of New Bedford*, 155 Mass. 313, 315; S. C. 175 Mass. 257; *Mayor, etc., Newark* v. *Tunis*, 81 N. J. Law 45. "This is the case, for, eliminating exceptional and extraordinary conditions, giving an abnormal value for the moment to stock, it is apparent that the general market value of stock is its true cash and selling value." *San Francisco National Bank* v. *Dodge*, 197 U. S. 70, 79.

Reporter's Statement of the Case

We are not dealing with the case of a "fair average value of its capital stock" because the plaintiff has no capital stock. Its potentiality to profit by the exercise of its corporate franchise (*Ray Copper Co.*, *supra*) does not affect the value of the securities held by it in other concerns, however much it would affect its own capital stock, if it had any. Under the evidence adduced the insurance company was entitled to a refund. This conclusion is not affected by the Government's contention that the commissioner's values must be "accepted in their entirety or rejected in their entirety." To the extent they are not shown to be erroneous they should stand, but to the extent they are shown to be incorrect and erroneous they should not stand. The failure of the taxpayer to attack some items will not defeat his right to recover for taxes erroneously or illegally assessed and collected.

The plaintiff should have judgment. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

COLE STORAGE BATTERY CO. v. THE UNITED STATES

[No. D-784. Decided April 2, 1928]

On the Proofs

Excise tax; sec. 900, revenue acts of 1918 and 1921; accessories for automobiles; storage batteries.—Storage batteries designed for the special purpose of being used to replace a component part for automobiles are accessories for automobiles within the meaning of section 900 of the revenue acts of 1918 and 1921, and subject to the excise tax therein imposed.

The Reporter's statement of the case:

Mr. Harry C. Kinne for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Messrs. Robert H. Montgomery, *Thomas G. Haight* and *J. Marvin Haynes* filed a brief as *amici curiae*.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The plaintiff is a corporation duly incorporated under the laws of the State of Illinois, with its principal place of business in Chicago, in the State of Illinois, and is now and has been since September, 1917, engaged in the manufacture of storage batteries and storage-battery parts.

II. By various and sundry payments beginning October 6, 1919, and ending February 1, 1922, the plaintiff paid the United States manufacturer's excise taxes, penalties, and interest in the sum of $14,446.31 under section 900, subdivision (3), of the revenue acts of 1918 and 1921, respectively, on completed storage batteries and battery parts sold separately.

III. On September 7, 1922, plaintiff filed a claim for refund, and on July 8, 1923, the plaintiff was refunded the sum of $7,333.82, being that portion of the above amount which it had paid as taxes on battery parts sold separately, leaving the amount of $7,112.49 paid on completed storage batteries. Of this sum, $2,149.43 was paid prior to 4 years preceding January 16, 1924, and is barred by the statute of limitations, and plaintiff waives any claim thereto, leaving a balance of $4,963.06, for which demand has been made and refused.

IV. The following payments were made on completed storage batteries subsequent to February 1, 1922:

Period for which paid	Date paid	Date receipt issued	Amount
January, 1922	Feb. 28, 1922	Mar. 1, 1922	$748.44
February, 1922	Mar. 31, 1922	Apr. 6, 1922	580.31
February, 1922	Mar. 31, 1922	Apr. 1, 1922	77.32
March, 1922	Apr. 29, 1922	May 1, 1922	1,238.60
April, 1922	May 29, 1922	May 31, 1922	1,485.55
May, 1922	June 29, 1922	June 30, 1922	1,045.32
June, 1922	July 31, 1922	Aug 1, 1922	1,264.87
July, 1922	Aug. 31, 1922	Sept. 1, 1922	636.17
August, 1922	Sept. 29, 1922	Sept. 30, 1922	701.51
September, 1922	Oct. 31, 1922	Nov. 1, 1922	685.86
October, 1922	Nov. 29, 1922	Dec. 1, 1922	562.37
November, 1922	Dec. 30, 1922	Jan. 2, 1923	451.83
December, 1922	Jan. 31, 1923	Feb. 1, 1923	459.61
January, 1923	Feb. 28, 1923	Mar. 1, 1923	417.38
February, 1923	Mar. 31, 1923	Apr. 2, 1923	436.59
March, 1923	Apr. 30, 1923	May 1, 1923	590.40
April, 1923	May 31, 1923	June 1, 1923	832.09
May, 1923	June 30, 1923	July 19, 1923	969.33
June, 1923	July 30, 1923	Aug. 2, 1923	590.90
July, 1923	Aug. 31, 1923	Sept 4, 1923	605.47
August, 1923	Sept. 29, 1923	Oct. 1, 1923	727.21
September, 1923	Oct. 31, 1923	Nov. 2, 1923	514.19
October, 1923	Nov. 30, 1923	Dec. 3, 1923	662.10
Total			16,283.42

V. A storage battery is composed of a container (a glass or rubber jar), a positive and negative group of plates immersed in an electrolyte solution (which may be acid or alkaline, depending on the metals used), usually dilute acid, a group of which plates is usually made of oxide or dioxide of lead and the other group of gray oxide of lead. The oxides usually are spread over a lead frame or grid to form a plate. The dioxide and acid are decomposed and form a new sulphate with the other plate. Small wooden partitions or squares, called separators, are inserted between the plates to keep them from touching, buckling together, or shorting. The negative plates are connected together, as are also the positive plates. A top is put on the jar and sealed over with sealing wax, leaving a terminal post exposed. A cell is composed of a certain number of positive and negative plates. A battery may consist of one or more cells, usually of 3 to 6 cells. One cell will produce an electric current of two volts. There is no particular shape for a storage battery. Sometimes storage batteries are oblong, sometimes square, depending on whether the cells are put in end to end or with flat sides together. A storage battery may consist of any number of cells, depending upon the voltage desired.

VI. The current produced by storage batteries in general may be used for propelling electric automobiles, for lighting, ignition, and starting automobiles propelled by internal-combustion engines, for ignition on motor boats, for the auxiliary current in farm lighting plants, for propelling mining cars and small baggage trucks, for lighting at summer camps, for operating doorbells, for operating railway switches, for operating wireless telegraphy, for radio purposes, for operating telephones, for operating fire alarms and bank signals.

Storage batteries were first used as standard equipment on automobiles propelled by internal-combustion engines in 1911, for lighting and ignition purposes. In 1912, the Cadillac automobile was equipped with a starter requiring a storage battery.

During the period that the taxes involved in this suit were collected the majority of automobiles required a

storage battery as a part of the regular equipment for the functioning of the lighting, ignition, and starting devices.

The principle of the storage battery was utilized prior to the development of the automobile, but the types of batteries then used are not shown nor the extent of such use.

VII. Plaintiff during the period involved in this suit manufactured and sold lighting and starting batteries which were designed for the special purpose of being used to replace a component part for automobiles. The majority of such batteries were of six-volt capacity. Plaintiff's business policy was to manufacture a battery which would be used on any make of automobile equipped with a storage battery. Many types of batteries were manufactured that would not have been necessary except that the specifications for different automobiles required batteries of different shapes. The batteries were sold principally to dealers and jobbers, who were in the business of conducting garages and service stations. No tax was paid on radio batteries and plaintiff's catalogue advised purchasers that excise taxes on automobile batteries would be added to the purchase price.

Plaintiff specialized on a battery with thin plates, as this would tend to produce a battery with more spontaneous action for the starting device of an automobile.

VIII. On January 16, 1924, plaintiff filed with the Commissioner of Internal Revenue claim for refund for the above sums and interest. The entire claim for refund was rejected and disallowed by the Commissioner of Internal Revenue on May 8, 1924.

IX. Plaintiff has waived claim for interest on the amounts of taxes for storage batteries which have accrued previous to February 1, 1922.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover excise taxes claimed to have been illegally exacted by the Commissioner of Internal Revenue over a period extending from February 28, 1922, to November 30, 1923. The amount of tax paid is $4,963.06. The

plaintiff is an Illinois corporation engaged in the manufacture and sale of storage batteries. The batteries taxed and upon which this suit is founded were batteries designed for use in automobiles. The commissioner assessed and collected the tax under section 900 of the revenue acts of 1918–1919. This section and its subdivisions read as follows:

From and after February 24, 1919 (1918 act) (January 1, 1922, 1921 act), "there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum; * * *." (40 Stat. 1057, 1122.)

The issue narrows to the single contention, i. e., are storage batteries a part or accessory of an automobile?

Article 14 of Regulations 47 adopted by the commissioner is in part as follows:

"* * * any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory.'"

Article 15 of the same regulation is in the following language:

"* * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily

adapted only for use as a component part of such vehicle. * * *

"Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

Article 16 contains the following provisions:

"* * * any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation. * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.' * * *

"Parts or accessories for automobile trucks, automobile wagons, other automobiles or motor cycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of section 900. For example, a self-starter primarily adapted for use on an automobile, if sold to a manufacturer of motor boats, such manufacturer stating in his order that it is to be used in the manufacture of a motor boat and not upon an automobile, is not taxable."

The plaintiff does not assert that a storage battery, such as here involved, does not fall within article 14 of the regulations. The exemption claimed is obviously predicated upon the second paragraph of article 16 of the regulations. An argument is advanced that the plaintiff's product is one of general commercial use and while adaptable to use in an automobile it is not restricted to such a use. In other words, while used in automobiles, storage batteries are of such general utility that it may not be said of them that they are especially designed for automobiles.

We hardly think it essential to enter upon a scientific résumé of the origin and detail construction of storage batteries and manner of functioning. It is not denied, and obviously is incapable of disputation, that an automobile so far as locomotion is concerned, if operated by a gasoline engine, would be a more than useless device without a storage battery. This case in our opinion turns upon the restricted issue as to whether a storage battery, especially adapted for and so designed and advertised as to meet the essential requirements of locomotive power, is a part or accessory of an automobile. The fact that a storage battery is available for use for a number of purposes other than for an automobile, or, that its creation antedated the invention of the automobile, is not determinate of the issue. A variety of parts of an automobile are susceptible of use in other devices, and other parts, both as to form and functioning elements, existed long prior to the coming of the automobile itself. What seems to us to turn the contention is the fact that in a combination of various elements to function in a certain way the accomplishment of the purpose is only attainable where a gasoline engine is used by coupling certain elements up with a storage battery, and without its presence the mechanism is useless. We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue. The commissioner is careful not to tax storage batteries as such, and adopts a method of procedure which reaches only those as described in the findings.

The defendant's quotation from the case of *Magone* v. *Wiederer*, 159 U. S. 555, 559, seems apposite:

"If exclusive use were made the test, then an exception would destroy the rule; for however general and universal the use of a particular article might be, if exceptionally used for another purpose, such use would destroy the effect of the general and common use, and make the exception the controlling factor. It is urged that if exclusive use is not made

the criterion it will be impossible to assess duties, because of the difficulty of ascertaining the chief or general and common use; but it is manifest that this argument of inconvenience is a mistaken one, and that, on the contrary, it would be impossible to resort to use as a criterion of classification if exclusive use must be ascertained in so doing, for that which is generally and commonly done may be known, but that which is so universally done as to be without any exception is difficult, if not impossible, of ascertainment."

This court has passed upon somewhat similar contentions to those involved in the instant case, and the plaintiff has cited them as applicable to its argument. In the *Martin Rocking Fifth Wheel Co. case*, 60 C. Cls. 466, the device sought to be made a part of an automobile was a distinct and totally separate device. True it was attached to the automobile; but it was more or less a convenience and in nowise essential to the movement of the automobile itself. The *National Rubber Filler Co. case*, 63 C. Cls. 337, is different from this case in most all respects. The substance used to lengthen the life of a tube on the verge of final extinction was no more than an external application of something calculated to prolong the life of the tube. It at no time entered into its original construction, nor was it an integral part thereof.

The *Atwater Kent Manufacturing Co. case*, 62 C. Cls. 419, is self-explanatory.

We think the petition must be dismissed. It is so ordered.

Moss, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

EVERLASTIK (INC.) v. THE UNITED STATES

[No. C-1004. Decided April 2, 1928]

On the Proofs

Jurisdiction; Dent Act; decision by Secretary of War prerequisite to suit.—See *United States Bedding Co.* v. *United States*, 55 C. Cls. 459.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiff. *Mr. James Mercer Davis* was on the brief.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. At the times hereinafter mentioned plaintiff was a corporation duly organized under the laws of the State of Massachusetts and engaged in the manufacture of elastic webbing, made of silk and cotton in combination with rubber thread, and used principally for garters and suspenders. It operated plants at Lowell, Massachusetts; Chelsea, Massachusetts; Brockton, Massachusetts; Bridgeport, Connecticut; Pawtucket, Rhode Island; Bayonne, New Jersey; and Mansfield, Ohio.

II. During the summer and fall of 1918 Captain Carrolton R. Richmond, afterwards Major Richmond, representing the Purchase, Storage, and Traffic Division of the Quartermaster Corps, United States Army, visited plaintiff's various plants for the purpose of determining the capacity of each plant, with a view to recommending to the contracting officers of the Government that contracts be placed for certain material, including nonelastic webbing. As a result of these visits made by Major Richmond and future conversations had between Major Richmond and the representatives of plaintiff company, several formal written contracts were entered into by and between the Government of the United States and plaintiff company, wherein plaintiff company obligated itself to furnish and deliver to the Government of the United States large quantities of nonelastic webbing, according to specifications prepared and furnished by the Government, and attached to and made a part of said contracts. All of these formal contracts were performed or canceled and said contracts are not the foundation of this action and are not material in the consideration of the questions involved herein, except as hereinafter stated in these findings.

III. Before the war plaintiff company was engaged in the manufacture of elastic webbing only, and the webbing which the Government needed and required under its various contracts was nonelastic and of a different character. Plaintiff company had much difficulty with its contracts with the Government in that the webbing manufactured by it in accordance with the specifications as to yarn did not always equal the required standards of weight and breaking strength, as required under the specifications attached to the contract. The Government specifications for light webbing all required 16/2-ply yarn. In the early part of September, 1918, a representative of the plaintiff company stated to Lieutenant Harold D. Holmes, who was in charge of the inspection of webbing on Ordnance Department contracts, that it had 60,000 lbs. of 20/3-ply yarn, which it was desirous of using in place of the 16/2-ply yarn in the manufacture of the webbing under its contracts. The 20/3-ply yarn was not greatly different from the 16/2-ply yarn and the cost of the 20/3-ply yarn was as much or more than the cost of the 16/2-ply yarn.

On September 7, 1918, Lieutenant Holmes wrote the following letter to the Boston Depot Quartermaster:

"1. Since the light-weight webbings at the Lowell and Pawtucket branches of the Everlastik, Inc., have recently fallen below specifications in tensile strength, it would seem that the recent propensity of that contractor to offer the Government inferior material was again shown here. The writer has recently had the opportunity to look into this matter, inasmuch as Mr. Chisholm, of the Everlastik, Inc., paid this office a visit a few days ago. This gentleman wishes sanction to be given him for a revision in construction on all light-weight webbings to be manufactured at the five Everlastik plants within the next few months. The following outline of the construction on these materials was given by Chisholm: 20/2-ply yarn is now being used in the edge, face, and back of all Everlastik light-weight webbings. The binder threads and the filler are now comprised of 16/2-ply yarn.

"2. Beginning within a short time the Everlastik, Inc., wishes to substitute a 20/3-ply yarn for the 16/2-ply now being used in the binder. This contractor now has 60,000 lbs. of the 20/3-ply to dispose of in this manner, and will use it only for the 16/2-ply binder thread present in material now being processed.

"3. Within three months Mr. Chisholm purposes to bring about still another change in the construction of the light-weight fabrics, namely, that of employing a 16/2-ply yarn in all portions of the warp and a 20/2-ply yarn in the filling.

"4. To all these projected changes this office gave its consent, inserting the proviso that the webbing should be kept up to weight, width, thickness, and breaking strength. It is believed that the inspectors at the various Everlastik plants will be able to hold this contractor to the strict letter of his contract obligations. The composition of the following light-weight webbing will undergo the changes noted above: ¾″, 1″, 1½″, 2″, 5¼″.

"5. It is requested that samples of these materials from the three Everlastik plants under the jurisdiction of the Boston depot be forwarded to this office with regularity in order that it may keep in close touch with the standard of quality maintained through the several alterations in these fabrics."

A copy of this letter with the exception of the first paragraph was sent to the plaintiff company, and it proceeded to use 60,000 lbs. of 20/3-ply yarn in the performance of contract No. 6584–B dated September 24, 1918, which contract called for approximately 200,000 yards of webbing at a total price of $11,500. This contract was settled by virtue of a cancellation agreement, numbered 964, whereby plaintiff received in settlement thereunder the sum of $3,123.94 by check No. 127574, dated June 19, 1919, which plaintiff accepted in full adjustment, payment, and discharge of the said contract.

Plaintiff manufactured in all 402,194 yards of webbing, which webbing was rejected by the Government because it was not in accordance with contract specifications. A part of this webbing was rejected material under contract 6584–B. Another part of this webbing was rejected material under a written contract No. 5525–EQ between plaintiff and defendant dated June 17, 1918, which contract was settled by an award dated August 19, 1919, whereby plaintiff received in settlement the sum of $2,418.65.

At said time plaintiff company had two other contracts with the Government, namely, contract No. 6585–B and contract No. 7856–B. No deliveries were made under either of these contracts.

Plaintiff company filed a claim under the Dent Act for the 402,194 yards of webbing, which claim was disallowed by the

board that heard the same, and no appeal therefrom was taken to the Secretary of War.

IV. On June 19, 1918, plaintiff entered into a formal written contract with the United States, No. P 10171–5553 EQ, calling for the manufacture of 2,140,000 yards of ⅝″ 1-oz. O. D. webbing at a price of $0.075 per yard, deliveries to commence in September, 1918, with 90,000 yards, and to be completed in December, 1918. The specifications called for ⅝″ webbing to weigh 1 ounce per linear yard, to be made of 10s/5 yarn in the web and 5-ply in the filling and to have a breaking strength of 400 pounds.

Plaintiff placed orders with yarn mills for a sufficient quantity of 10s/5 yarn to cover the amount required for the performance of the contract, but there was a delay in the delivery of the same, and on account of plaintiff's inability to secure enough 10s/5 yarn to enable it to perform the contract on schedule time, it asked the Government officers for permission to use 8s/4 yarn in place of 10s/5. The difference between the two yarns was that the 10s/5 had five strands of thread and the 8s/4 had four strands. Major Richmond, of the Procurement Division of the Ordnance Department, apthorized the plaintiff company to make the substitution and plaintiff substituted 8s/4 yarn for 10s/5 yarn in three of its mills in which it was manufacturing the ⅝″ webbing.

The product of the mills at Pawtucket, Rhode Island, and Chelsea, Massachusetts, in which the 8s/4 yarn was used, passed inspection and was accepted by the Government and was paid for as manufactured under contract No. 5553 EQ.

The ⅝″ webbing manufactured at the other mills of the plaintiff out of 8s/4 yarn did not pass inspection and was rejected because 8s/4 yarn was used in place of 10s/5 yarn.

A total of 969,957 yards of webbing made out of the 8s/4 yarn at all the plaintiff's mills was rejected by the Government and negotiations were entered into by and between plaintiff company and Government officials for another contract to be entered into whereby the plaintiff was to deliver 376,000 yards of this webbing, the same being a part of that which had accumulated as the production of the webbing made out of the 8s/4 yarn, at a price slightly less than the contract price for webbing made out of 10s/5 yarn, but this contract was never entered into.

Contract No. 5553–EQ was canceled and a settlement was made under date of July 22, 1919, whereby plaintiff was awarded and paid $63,697.22. Plaintiff filed a claim with the War Department under the Dent Act for compensation for the said 969,957 yards of webbing, but said claim was disallowed and no appeal therefrom was ever taken to the Secretary of War.

V. In September, 1918, plaintiff company had manufactured at its mill at Chelsea, Massachusetts, 344,001 yards of webbing which did not come up to the Government specifications under either of the contracts that plaintiff company had with the Government. Negotiations were entered into for the purchase by the United States of the rejected webbing, and samples were sent to Washington for examination and test. As a result of the negotiations a purchase order was issued by S. W. Shaffer, captain, Quartermaster Corps, dated September 20, 1918, No. 5387–B for approximately 344,001 yards of webbing at 10¢ per yard, to include the cost of commercial packing, or at a total cost of approximately $34,400.10. A copy of said purchase order is filed with plaintiff's petition, marked "Exhibit A," and is made a part hereof by reference. S. W. Shaffer was never designated as a contracting officer and no formal contract for the 344,001 yards of webbing was entered into.

This 344,001 yards was inspected by the Government and rejected because it did not comply with the specifications that were made a part of purchase order dated September 20, 1918. Plaintiff filed a claim with the Secretary of War under the Dent Act for the price of the 344,001 yards of webbing and on June 11, 1920, plaintiff was allowed 2¢ per yard on 228,500 yards, representing the difference in contract price and price at which retained by contractor and 1¢ per yard on 115,501 yards, representing loss to contractor in sale of yardage, and an award was made in the sum of $5,725.01. The award was paid by voucher No. 1662 and check No. 152716, dated August 28, 1920.

VI. During the time that plaintiff company was performing its formal contracts heretofore mentioned, it manufactured 135,597 yards of ⅝″ webbing, which did not equal the Government specifications as to weight. Negotiations were

entered into for the purpose of having the United States accept the rejected webbing and samples were sent to Washington, which were examined and tested. As a result of the negotiations a purchase order was issued, dated October 4, 1918, order No. 4913-B, for approximately 135,597 yards of ⅝″ webbing at $0.065 per yard, to include the cost of commercial packing, or at a total cost of approximately $8,813.81. The specifications provided that the ⅝″ sulphur-dyed olive-drab webbing was to weigh 0.83 oz. per lineal (*sic*) yard, and to stand a breaking strain of 400 lbs. A copy of said purchase order is filed with plaintiff's petition, made part thereof, and marked "Exhibit B," and is made a part hereof by reference.

The purchase order was executed and signed by S. W. Shaffer, captain, Quartermaster Corps, purchasing quartermaster. S. W. Shaffer was not designated as a contracting officer. At the time the purchase order was executed and delivered to plaintiff company it was understood between officials of plaintiff company and S. W. Shaffer that if the rejected webbing did not comply with the specifications the Government would take the same at a price and under specifications that were to be determined later, but no written agreement of this kind was entered into by plaintiff company and the Government officials.

All of the 135,597 yards of webbing was rejected by the Government for the reason that it did not comply with the specifications attached to and made a part of the purchase order. Plaintiff company filed a claim with the Secretary of War under the Dent Act, wherein it asked for compensation for the 135,597 yards of webbing, which claim was heard by the War Department Claims Board, and an allowance of 2¢ per yard was made on 135,000 yards, the balance of 597 yards having been disposed of by plaintiff, and plaintiff was awarded the sum of $2,700, which amount was paid plaintiff by check No. 151224, dated August 10, 1920.

VII. During the year 1918 the Government was in urgent need of heavy webbing, and the capacity of the mills of the United States was not great enough to manufacture all of the heavy webbing that the Government required. Plaintiff

company had no machinery in the mills operated by it that could make the heavy webbing. In September, 1918, the representatives of the plaintiff company conversed with Major C. R. Richmond, representing the Purchase, Storage, and Traffic Division of the Quartermaster Corps, and Major Richmond told them that the Government was in urgent need of heavy webbing and that if they would install looms large enough to manufacture said heavy webbing the Government would give them enough orders to keep the looms running. As a result of this conversation plaintiff company purchased 52 looms from Crampton & Knowles Loom Works, Worcester, Massachusetts, at a cost of $134,230.81, and erected a building in which to place the looms at a cost of $176,970.51.

No formal contract was ever entered into by and between plaintiff company and the Government of the United States with reference to the purchase of said looms or to the erection of said building, but before the building was erected it was necessary for plaintiff to obtain the permission of the War Industries Board for its erection. Major C. R. Richmond assisted the plaintiff in obtaining such permission, which was granted on September 17, 1918, in a letter signed by S. P. Bush, director, facilities division, which letter was as follows:

SEPTEMBER 17, 1918.

EVERLASTIK, INC.,
Chelsea, Mass.

GENTLEMEN: We grant permission to construct plant extension to house fifty new looms for the Quartermaster Department. Permission is given with the understanding that the extension in question is to be built of brick and timber, no steel required, and the materials available locally, as well as labor and power, the total cost to be one hundred thousand dollars, to be financed by yourselves. If any preliminary certificate is required it should be applied for in the regular way.

Yours truly,

S. P. BUSH,
Director Facilities Division.

The building in which to house the looms was about 50% completed on November 11, 1918, and at that time the 52 looms had been bought, but had not been installed in said

building. No contract of any kind was ever given the plaintiff company by the Government for the manufacture of heavy webbing. The 52 looms were of special make and were not suitable for the making of webbing for commercial trade.

Plaintiff filed a claim with the War Department under the Dent Act for compensation for the said 52 looms and the building in which they were housed, but said claim was disallowed and denied by the Board of Contract Adjustment, and no appeal was taken to the Secretary of War.

VIII. During the time that plaintiff was performing its several contracts hereinbefore mentioned, the Government officials were continuously urging it to keep the looms busy and to speed up production, and advised them that if they had difficulty in purchasing yarn suitable to make webbing that would comply with the Government specifications, under its several contracts, they should continue to make webbing, and if it fell below Government specifications in some respects but was usable by the Government, spot orders would be issued and said webbing would be taken by the Government at a price to be determined later. As a result of these suggestions made by Major C. R. Richmond, representing the Purchase, Storage, and Traffic Division of the Quartermaster Corps of the United States Army and Lieutenant Harold D. Holmes, a chief in the inspection division, neither of whom was designated as a contracting officer, plaintiff company continued to make webbing that did not come up to the specifications, and the total yardage manufactured by the plaintiff exceeded the total yardage called for by all of the formal contracts that plaintiff had with the Government.

It was suggested to plaintiff's officers that if this surplus webbing was usable by the Government, even though it failed to comply with Government specifications in some respects, spot orders would be issued and said webbing would be taken by the Government at a price to be determined later. One or two spot orders were issued and a small part of this surplus webbing was accepted by the Government and paid for at a price less than the price specified in any of the formal contracts, but when the armistice intervened no further spot orders were issued by the Government for the webbing and

at the time of the termination of plaintiff's contracts it had on hand approximately 1,851,749 yards of webbing, which included the webbing that was rejected under its formal contracts and the surplus webbing, which was never delivered to the Government. If this webbing had complied with the Government specifications it would have been worth approximately 6½¢ per yard. It was not the kind of webbing that was suitable for the commercial trade. Plaintiff company sold about 50% of the webbing that it had on hand after the termination of its contract for 1¢ a yard. It does not appear from the evidence what disposition was made of the balance.

The court decided that plaintiff was not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

In this suit the plaintiff claims approximately $524,000, composed of several items alleged to constitute sums recoverable under the Dent Act. An elaborate report of facts has been made by a commissioner of the court and exceptions to this report were filed by the plaintiff. These have been considered and nothing substantial appearing that requires a change, the commissioner's report is confirmed. Several items of the claim have been presented to the Board of Contract Adjustment created under the Dent Act, whose rulings have been adverse to plaintiff's contentions. The case has been instituted in this court without any action having been taken by the Secretary of War upon the claims.

There were a number of duly executed contracts in writing entered into between the plaintiff and the Government, but these are not made the basis of complaint.

1. One claim is based upon the allegation that plaintiff contracted to manufacture 402,194 yards of webbing, that it complied with its contract and was entitled to receive about $23,000, but that the Government refused to accept the same. The fact is that this webbing was material offered under two contracts and rejected because it did not comply with specifications. Both of these contracts were subsequently

settled between the parties and allowances made by the Government that were paid to and accepted by the plaintiff in full settlement and discharge of the contracts. Afterwards, this same item was presented, as already stated, under the Dent Act, to the Board of Contract Adjustment and any allowance thereon was refused by that board May 26, 1920. No appeal was taken to the Secretary of War and no action by him is shown. If there was any merit in the claim as a Dent Act claim the failure to have the same passed upon by the Secretary of War would preclude the maintenance of the suit in this court. See *United States Bedding Co. case*, 55 C. Cls. 459.

2. Another claim is for the value of some 969,000 yards of olive-drab webbing. This was rejected because it could not pass inspection, having been made of smaller and lighter yarn than was required by the specifications. The contract under which it was made called for more than two million yards, and after large quantities had been supplied the contract was canceled and a full and final settlement made in July, 1919, whereby the plaintiff was paid and accepted in settlement of the contract liability a large sum. Upon the theory that this rejected webbing was contracted for in an informal contract, there is claimed about $70,000 for its breach. But no such contract, oral or written, was ever made. This, as the former claim, was also presented to the Board of Contract Adjustment as a Dent Act claim and disallowed April 3, 1920. No further action was taken by plaintiff and no action whatever was taken by the Secretary of War. It is only from his action that an appeal is allowed. *United States Bedding Co. case*, *supra*.

3. Another claim is on account of 344,000 yards of webbing that was rejected, but was afterwards made the subject of negotiations looking to its use by the Government. It was, however, again rejected. Claim for it was presented to the Board of Contract Adjustment under the Dent Act and, holding that there was an informal contract, that board made an allowance in settlement, which was paid to and accepted by plaintiff.

4. Still another claim is on account of about 135,000 yards of webbing that was rejected by the Government. But this

Syllabus

claim, as was the one last above mentioned, was presented to said board, who having heard the same made an allowance in settlement which was paid to and accepted by plaintiff.

5. The further claim, much the largest of all, is to the effect that the plaintiff entered into an agreement with authorized agents of the Secretary of War to purchase a large number of looms of special kinds adapted to the Government's work and that these officers or agents urged their purchase and the erection of a building in which to house and operate them, and agreed to give the plaintiff contracts for heavy webbing to an extent necessary to pay for same. No such contract was ever made. The plaintiff did begin the construction of a building but before doing so sought the necessary permit, which was authorized in September, 1918, with the distinct statement that it was to be financed by the plaintiff. This claim was also presented to the Board of Contract Adjustment, which disallowed the same because there was no agreement, oral or otherwise, to reimburse the plaintiff for the looms or building. The purchase of the one and the construction of the other were the plaintiff's own venture. No appeal from the board's ruling was taken to the Secretary of War and no action by him in the premises is shown.

The petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

CLARENCE J. BELL, ADMINISTRATOR OF THE ESTATE OF JOHN DEGROOT, v. THE UNITED STATES

[No. C-889. Decided April 2, 1928]

On the Proofs

Commutation of quarters, U. S. Coast Guard; act of June 10, 1922, as amended by act of May 31, 1924; availability of quarters.—The quarters available under section 6 of the act of May 31, 1924, must be such as are adequate for an officer's dependents as well as for himself, and where the quarters furnished him

are not only inadequate for that purpose but for administrative reasons his dependents would not have been permitted to occupy them, he is entitled to commutation of quarters.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. John G. Ewing* was on the briefs.

The court made special findings of fact, as follows:

I. John DeGroot, a warrant officer, United States Coast Guard, to wit, a boatswain (L) in the life-saving branch, served from July 1, 1922, to November 8, 1922, at City Point Station, South Boston, Mass.; from November 9, 1922, to March 31, 1923, at Old Harbor Station, Chatham, Mass.; and from April 1, 1923, to January 12, 1925, at City Point Station, South Boston, Mass. He was retired from active service on January 13, 1925, and died December 5, 1925.

II. On January 25, 1927, on motion filed by the attorneys for the decedent, Clarence J. Bell, of Wellfleet, Mass., who was appointed administrator of the estate of John DeGroot by the Probate Court of Massachusetts, was substituted as plaintiff in this case.

III. While at City Point Station the decedent was furnished three rooms on a house boat anchored a half mile off shore, said station being a floating station. Two of these rooms were located on the first deck of the house boat, one being used by DeGroot as living quarters and the other as an office. The third room, which was approximately 6 feet square, was located on the upper deck, and contained a tank which occupied a large part of the room and had to be filled with water to flush the toilet below. The room otherwise was empty, except that during cold weather the men on the bridge kept their log there and a few of their belongings.

At Old Harbor Station decedent was furnished one room, constituting an office and bedroom.

These quarters were inadequate to accommodate decedent's dependents, nor would they have been permitted for admin-

istrative reasons to occupy said quarters, even if adequate. There were no public quarters available for occupancy by the dependents of the decedent at the stations referred to. During the period in question he had a wife and five minor children dependent on him for support, and he furnished quarters for them at his own expense at Wellfleet, Mass.

IV. Under the act of June 10, 1922, 42 Stat. 628, 630, as amended by the act of May 31, 1924, 43 Stat. 250, an officer of the rank of John DeGroot is allowed two rooms, and, where public quarters are not available, a rental allowance of $20 per room per month.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Plaintiff is suing to recover rental allowance which he claims is due the estate of John DeGroot, a warrant officer in the life-saving branch of the United States Coast Guard, who died December 5, 1925.

The first permanent station of the decedent was at City Point Coast Guard Station, South Boston, Mass., where he was furnished three rooms from July 1, 1922, to November 8, 1922. The findings show that two of these rooms were located on the first deck of a house boat anchored a half mile offshore, the City Point Station being a floating station, one of the rooms being used by DeGroot as living quarters and one as his office. The third, a small room on the upper deck, was empty except during cold weather, when the men on the bridge kept their log there and a few of their belongings. From November 9, 1922, to March 31, 1923, he was assigned to Old Harbor Station, Chatham, Mass., where he was furnished one room, which was used as an office and bedroom. He was transferred to City Point Coast Guard Station on April 1, 1923, where he remained until January 12, 1925, and occupied the same quarters as during his first assignment there. He was retired from active service on January 13, 1925.

As stated in the petition, the applicable statute is the act of June 10, 1922, 42 Stat. 628, as amended by the act of May 31, 1924, 43 Stat. 250, which amendment was retroactive to July 1, 1922.

Section 6 of the act of May 31, 1924, provides that an officer "while either on active duty or entitled to active-duty pay shall be entitled at all times to a money allowance for the rental of quarters." The decedent was on active duty, and therefore came within this provision of the statute. The act further provides: "To an officer having a dependent, receiving the base pay of the first period, the amount of this allowance shall be equal to that for two rooms." The officer in this case had dependents and was therefore entitled to an allowance for two rooms under the last provision. It may be noted that this last provision clearly has reference to a provision for dependents. The fourth paragraph of section 6 is as follows:

"No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents."

It is evident that the act was intended to give an officer rental allowance where at his station public quarters are not available adequate for the occupation of the officer and his dependents; that is, in the case of this officer, two rooms that were available for the use of himself and his dependents. We do not take the view that this rental allowance is personal to the officer. The quarters available were to be such as could be occupied by him with his dependents. The quarters assigned decedent at City Point Coast Guard Station were on board a boat, a floating station, anchored at sea, where, under the regulations of the department, he could not have his dependents live with him. He was thus not provided with quarters available for the use of himself and his dependents, and is therefore entitled to recover rental allowance for two rooms during the period he was stationed on the boat.

At Old Harbor Station he was allowed only one room, and it does not appear that there were any quarters available for the use of himself and his dependents.

The rental allowance provided by statute for an officer of the grade of decedent is $40 per month for two rooms, and plaintiff should recover at that rate for the period from July 1, 1922, to January 13, 1925, during which time decedent was on active duty at the above-named stations. Judgment should be entered for $1,216, and it is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice,* concur.

SIMON R. CURTIS v. THE UNITED STATES

[No. E-369. Decided April 2, 1928]

On the Proofs

Eminent domain; act of July 1, 1918; just compensation; refusal to accept 75% of award; interest.—See *Fannie C. Curtis et al.* v. *United States, ante,* p. 139.

The Reporter's statement of the case:

Mr. Allan D. Jones for the plaintiff. *Mr. George Nelms Wise* was on the brief.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a citizen of the United States, residing in Warwick County, Virginia, and has at all times borne true and loyal allegance to the Government of the United States.

II. On September 7, 1918, the plaintiff was the sole owner of the following described real estate, with all rights, privileges, and appurtenances thereunto belonging or appertaining:

"A. All that certain tract of land situate, lying, and being in Nelson District in York County, State of Virginia, located on York River, and being that part of the Bellfield Tract known as 'Sandy Point' (including the old Mansion House and yard) and containing two hundred and eighty-seven (287) acres, be the same more or less, and described and bounded as follows, to wit:

"Starting at a point on the lane at the corner of the lands of Howard S. McCandlish and E. W. Harwood (formerly the land of Daniel Morris) and running thence northerly on the ditch bank that divides the land herein described from the lands of E. W. Harwood; thence westerly in a straight line to a point on the line of the said E. W. Harwood opposite the line dividing the land of the said E. W. Harwood and the land herein described; thence from the point so established across the said road and along the said line running northerly to low-water mark on York River; thence along low-water mark to the extreme point of Sandy Point; thence to the center of the creek and thence along center of creek known as 'Indian Field Creek' to the line dividing the land of Howard S. McCandlish from the lands of Nannie E. McCandlish herein described, said line being marked by a wire fence; thence along said line to the point of beginning."

III. On September 7, 1918, the plaintiff had an undivided seven-eighths interest in the following-described real estate:

"All that certain piece or parcel of land situate in Stanley District, Warwick County, Virginia, being a part of what was commonly called 'Seaborn Tract,' bounded on north by Bryan and Robinson; on the east by the boundary of the right of way of the Government railway into the York Navy Mine Depot and part of Seaborn Tract, and on the west by the old county road, containing forty-five (45) acres, together with 2.17 acres additional in the right of way aforesaid."

The aforesaid tracts of land are located within the area of the Navy Mine Depot, Yorktown, Virginia, and were taken by the President of the United States for the United States, under act of Congress approved July 1, 1918 (Public, No. 182, 65th Congress), and passed into the possession and control of the United States September 8, 1918.

IV. The tract called "Sandy Point," together with the improvements thereon, the timber and riparian rights, on the 8th day of September, 1918, had a market value of $35,000.

V. Seven-eighths of the tract called "Seaborn's" and the right of way on the 8th day of September, 1918, had a market value of $4,000.

VI. On or about June 3, 1920, the Board of Valuation of Commandeered Property of the Navy Department made an award of compensation for the aforesaid taking.

Plaintiff refused to accept the award of the Board of Valuation at the time of its award and until November 5, 1925, refused to accept a 75 per centum of the award. On December 31, 1926, plaintiff was paid the sum of $14,726.25, 75 per centum of the award for the Sandy Point tract. On April 11, 1927, plaintiff was paid $1,955.63, 75 per centum of seven-eighths of the award for the Seaborn Tract.

The court decided that plaintiff was entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

Under the authority of an act of Congress of July 1, 1918, 40 Stat. 704, the President of the United States, by proclamation, took over a tract of land in York County, Virginia, consisting of 11,433 acres, for the purpose of establishing a Navy mine depot. Included within the metes and bounds of the area taken was a tract of land belonging to plaintiff known as "Sandy Point," containing 267.85 acres. Plaintiff was also the owner of a seven-eighths undivided interest in a 45-acre tract of land known as the "Seaborn Tract," situated three miles from the first-named tract, which was likewise taken. The Government also took a right of way over an adjoining tract belonging to plaintiff, consisting of 2.17 acres for use in the construction of a railroad to the naval mine base. All said property was taken under the authority of said proclamation on the 8th day of September, 1918. Plaintiff presented to the proper Navy board a claim for compensation for the property taken, and was awarded $19,635 for the Sandy Point Tract and $3,200 for plaintiff's interest in the Seaborn Tract and the 2.17 acres taken for the right of way. Plaintiff declined to accept either the full award or 75 per centum thereof.

In this action, which is brought for the recovery of just compensation, plaintiff is claiming $90,000 for the Sandy Point Tract, and $8,700 for the undivided interest in the Seaborn Tract and the 2.17 acres taken for the right of way.

The evidence as to value as applied to the Sandy Point land is based on problematical future development under a plan formulated by plaintiff for the building of bridges and roads, and a subsequent subdivision of portions of the land,

and the sale of same in building lots for residential purposes, and small parcels for truck gardening. Plaintiff was interested in securing the enactment by the General Assembly of Virginia of a measure authorizing plaintiff and others to build bridges over certain streams in the neighborhood of plaintiff's land. No steps, however, had been taken to develop the plan mentioned, although plaintiff had owned the property since 1906, and the act providing for the building of bridges and roads had been approved in March, 1916, more than two years prior to the taking. Without questioning the integrity of plaintiff's intention with reference to the development of this land, the court can not accept the values shown in the evidence as representing the fair market value at the time of the taking. It is also contended in plaintiff's brief that this property has a historic value, which should be considered in arriving at just compensation. The court is unable to agree with this theory. The Sandy Point farm, as well as the other land involved, is a short distance from Yorktown, to which certain historical associations undoubtedly attach, but the farm itself is endowed with no special feature of interest, historical or otherwise. The land is poor and unproductive, and the farming operations since plaintiff has owned same have been of inconsiderable importance and covered only a short period of time. The residence, known in the neighborhood as the "Digges Mansion," at the time of the taking, and for many years prior thereto, was in a dilapidated state and was occupied by a negro tenant who cultivated some of the land. Mere antiquity is not sufficient to entitle this farm to the distinction claimed by plaintiff. Plaintiff is entitled to the fair market value at the time of the taking, under conditions then existing.

The court has reached the conclusion that $35,000 for the Sandy Point Tract, and $4,000 for the seven-eighths interest in the Seaborn Tract, and the 2.17 acres taken for the right of way, represent the fair and reasonable market value of plaintiff's land on September 8, 1918. Plaintiff is entitled to recover that amount, less $16,681.88 paid; and it is so ordered.

Under the rule announced in the case of *Pope* v. *United States*, 61 C. Cls. 974, plaintiff can not recover interest for

the period between the date of the award and November 5, 1925. See Finding VI.

Judgment for plaintiff. It is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

THOMAS A. EDISON, INC., v. THE UNITED STATES

[No. F-29. Decided April 2, 1928]

On the Proofs

Settlement contract; delivery of Government material to warehouse; surrender of warehouse receipt; subsequent discovery of shortage.—Upon termination of a contract a quantity of material furnished by the Government and belonging to it was left in the contractor's hands. The Government failing to remove the same and storage space being limited, the contractor delivered the material to a warehouseman and took a receipt therefor, with the knowledge of the Government, and upon request duly made surrendered the receipt to the Government. A contract of final settlement was then entered into between the parties, covering all matters in dispute as to the terminated contract, and a balance being found due the Government, it was paid by the contractor. After the lapse of a year the Government presented the warehouse receipt to the warehouseman and received therefrom only a portion of the quantity warehoused, the shortage being unaccounted for. At the time it received the warehouse receipt the Government made no investigation of the quantity stored, and the time the shortage occurred is unknown. *Held*, (1) that delivery of the warehouse receipt was delivery of the property to the Government; (2) that the entire quantity being shown to have been delivered to the warehouse, it must be presumed to be there until the contrary is shown or a different presumption raised; and (3) credit given in the final settlement to the contractor for storage charges paid to date of surrender of receipt to the Government, together with payment by the contractor of the balance agreed to be due, constituted a final and binding discharge as to any claim for shortage.

The Reporter's statement of the case:

Mr. Arthur F. Egner for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact as follows:

I. The plaintiff is a corporation organized and existing pursuant to the laws of the State of New Jersey.

II. It is the sole owner of this claim by virtue of a merger of the Edison Phonograph Works with the said corporation in August, 1924, which operated as a matter of law as an assignment to it of all of the Edison Phonograph Works' choses in action.

III. The Edison Phonograph Works had a claim arising out of an informal contract with the defendant, No. 17051, dated April 17, 1918, for the manufacture of small tools. The claim was presented to the Secretary of War under authority of the Dent Act of March 2, 1919, and allowed in the sum of $1,761.72. A public voucher therefor was issued under date of February 1, 1921, which settlement was on said date accepted by the said Edison Phonograph Works. On July 21, 1924, the Comptroller General directed warrants to be issued in the following manner: One in the amount of $358.49 payable to the Edison Phonograph Works, and "one in amount of $1,403.23 payable to the Treasurer of the United States for deposit to the credit of the appropriation 'Armament of fortifications C.' This action is taken to make refund of an amount due for shortage of Government-owned material on contract P–11401–2166–TW."

A check in the amount of $358.49 was issued to the Edison Phonograph Works on February 11, 1925, which was not accepted but returned to the Treasurer of the United States under date of January 13, 1926. No payments of any other part of the said $1,761.72 award have been received by the Edison Phonograph Works or its successor, the plaintiff.

IV. The said contract P–11401–2166–TW, dated July 6, 1918, was terminated on December 31, 1918, at which time an inventory was taken by the Government's local inspector, which inventory showed that the said Edison Phonograph Works had, at its plant at Newark, N. J., among other materials and component parts furnished by the Government in accordance with the contract, 7,138 pounds of brass rods at an agreed unit value of 0.243321 per pound. The

Edison Phonograph Works made several applications, finally at Washington, for an order of disposition of the said material or that provision be made for the storing of the same in a warehouse, but was unable to obtain any order regulating such disposition. The said Edison Phonograph Works' facilities for storage in its plant becoming limited, it therefore, on March 25, 1919, removed the said brass rods to McGann Warehouse, of Newark, N. J., and took a warehouse receipt therefor. The said McGann Warehouse was a public warehouse having a good reputation and enjoying the confidence of many large users of warehouse facilities.

At the time of the delivery of the brass and the issuance of the said warehouse receipt the brass was weighed and its weight was found to be 7,243 pounds, and the warehouse receipt was in such amount executed.

V. The storage of the brass in the said McGann Warehouse was known to the Government, and its representative, by a letter dated October 10, 1919, requested the delivery of all warehouse receipts in the possession of the Edison Phonograph Works covering Government material in storage in the said warehouse, which request was immediately complied with, and the warehouse receipt for the said brass, together with the warehouse receipts for other materials, was turned over to the representative designated by the said letter as the authorized recipient thereof and duly receipted by him on behalf of the United States Government.

Thereafter the Edison Phonograph Works filed its claim growing out of the termination of its contract of July 6, 1918, with the Government. The New York District Claims Board investigated the matter, as it had authority to do, and made a formal award, a copy of which is attached hereto as Appendix A. This award was accepted by the Edison Phonograph Works, and thereafter, on December 3, 1919, the award was embodied in a formal settlement contract superseding and taking the place of the original contract. A copy of the settlement contract is attached hereto as Appendix B. The settlement contract was duly executed by the representative of the Secretary of War and the Edison Phonograph Works. It covered, as did the said award, all

matters in dispute between the parties as to the contract of July 6, 1918, and under it the Edison Phonograph Works was found to be indebted to the Government in the sum of $8,442.57, which said company paid and gave a full acquittance to the Government.

VI. On December 30, 1920, the Government presented said warehouse receipts to the said McGann Warehouse and received therefor but 1,451 pounds of brass, the shortage being unaccounted for by the warehouseman, except by the statement that the remaining poundage must have been stolen. The time or times when such shortage or shortages occurred is unknown.

VII. It does not appear that the defendant or its representative made any examination at the warehouse at the time of the delivery of the warehouse receipts to ascertain whether the material shown thereon was in the warehouse, and there is nothing to show that the defendant has ever taken any action or made any effort to secure reimbursement from the warehouseman for the shortage in the brass.

VIII. By the settlement contract the said Edison Phonograph Works was allowed as a credit its storage expense upon the said brass rods between the date of delivery to the warehouse and the delivery of the warehouse receipt to the defendant.

The court decided that plaintiff was entitled to recover $1,761.72.

GRAHAM, *Judge*, delivered the opinion of the court:

The claim in this case grows out of an informal contract, dated April 17, 1918, between the Government and the Edison Phonograph Works, which was merged with plaintiff in 1924. The Edison Phonograph Works presented its claim to the Secretary of War under the Dent Act of March 2, 1919. The claim was approved by the Board of Contract Adjustment and the Secretary of War, and a voucher for $1,761.72 was issued, but payment as to part of the award was stopped by the comptroller, his action being based upon the ground that under a previous contract Edison Phonograph Works was indebted to the Government in the sum of

$1,403.23, and he ordered that the voucher issued by the War Department to the Edison Phonograph Works be reduced to cover said indebtedness. The Edison Phonograph Works refused to accept the difference between the two sums mentioned and brought suit in this court.

This being an informal contract, it falls within the Dent Act. There is no question here as to there being a contract in fact and that the parties making the contract had authority to do so. The Dent Act gave the Secretary of War authority to settle the claim, and his decision is conclusive upon this court as to the rights of the plaintiff under that contract.

The counterclaim presented by the Government grows out of a contract entered into three months after the contract involving plaintiff's claim. Under that contract Edison Phonograph Works undertook to manufacture certain articles out of material furnished by the Government, and before the completion of the work the contract was terminated by the Secretary of War. Thereafter the parties entered into a settlement contract, which stated that it superseded the original contract and settled all matters arising thereunder. Among certain material in the possession of Edison Phonograph Works, which it was agreed in the settlement contract was the property of the Government, was a quantity of brass. This material was inventoried by a representative of the Government and the Edison Phonograph Works, its weight fixed at 7,138 pounds, and left in the possession of the said company. The latter having limited facilities for storage, and having made several attempts, without success, to have the Government remove its property or give some direction for disposition of it, going so far as to send a representative to Washington, it on March 25, 1919, stored the brass in a public warehouse of good reputation, taking the precaution to have the brass weighed on delivery thereto. The weight on delivery to the warehouse was found to be 7,243 pounds, about 100 pounds more than shown by the inventory referred to above. Having stored the brass, it took the warehouseman's receipt for the amount of brass shown by the weight at the warehouse.

The storage took place in March, 1919. In October the Government wrote to Edison Phonograph Works asking that

it deliver to defendant's representative, who presented the letter, all warehouse receipts covering Government material in storage at said warehouse. This was done by the Edison Phonograph Works and the Government's receipt taken therefor. The defendant made no examination at the warehouse at the time to ascertain whether all its material was there, apparently being satisfied with the reputable character of the warehouse and possession of the receipts; nor did it make any examination for more than a year afterwards, when it went to the warehouse to remove the material and received only 1,451 pounds of brass. The balance of the brass was unaccounted for except by the statement of the warehouseman that it must have been stolen.

It is not disputed that the Edison Phonograph Works exercised due care in the selection of the warehouse, as much care as it would have exercised in connection with its own property. The Government knew of the storage of the material. It demanded and accepted the warehouse receipts from the said company without making an examination of the material, and failed to make such an examination for more than a year.

"The transfer of the receipt is not a symbolical delivery; it is a real delivery to the same extent as if the goods had been transferred to another warehouse named by the pledge." *Union Trust Co.* v. *Wilson*, 198 U. S. 530, 536.

See also *Insurance Co.* v. *Kiger*, 103 U. S. 352, 356, and *Gibson* v. *Stevens*, 8 How. 384, 399.

Therefore the delivery of the warehouse receipts was delivery of the property. Thereafter the Edison Phonograph Works was relieved of all obligation to care for the property, and could have exercised no legal rights in regard to its possession or protection. By accepting the receipts the defendant confirmed the action of the Edison Phonograph Works in placing the goods in the warehouse.

The warehouse receipts were transferred to defendant in October, 1919. The shortage was discovered in December, 1920. In December, 1919, there was a settlement between the Government and the Edison Phonograph Works of all matters involved in the contract of July 6, 1918, the latter

being credited with $1,403.23 for storage charges paid by it to McGann Warehouse from March, 1919, to date of delivery of the receipts to the Government. Under this settlement a balance of $8,442.57 was shown to be due from the Edison Phonograph Works to the defendant, which was afterwards paid. Thus the defendant further confirmed the action of the Edison Phonograph Works in storing the material by crediting it with storage charges on the brass, and at the same time entering into a final settlement with it as to all matters growing out of the contract of July 6, 1918.

The defendant can not go behind this settlement and is debarred thereby from asserting the claim for shortage in brass. The settlement contract was based upon the findings and award of the New York District Claims Board, and contained a provision that the settlement contract canceled and superseded the original contract. It is significant that the award of the New York District Claims Board contained the following provisions:

"There are no known claims of the United States against the contractor arising out of or incident to the original contract which are not covered in reaching the foregoing determination.

* * * * *

"* * * such settlement shall constitute a complete determination of every question or claim, legal or equitable, liquidated or unliquidated, pertaining to or growing out of said contract."

The settlement contract contains a release and acquittance upon the part of the Edison Phonograph Works, and, as stated, the said company paid the amount due from it thereunder. It was the duty of the defendant to examine the goods in the warehouse before it entered into the final settlement.

It is contended that, granting that the delivery of the warehouse receipts relieved the Edison Phonograph Works from responsibility for the property thereafter, it did not relieve it from responsibility between the date of storage and the date of delivery of the receipts. In answer it may be said that it appears that the Edison Phonograph Works

was justified in placing the material in the warehouse, and, as already stated, in doing so it exercised the same care it would have exercised in the storage of its own property. It may also be stated that the Government at some time prior to the delivery of the receipts—it does not appear when—knew that the goods were in storage and could have secured possession of the property at any time, whether in storage or not. Aside from these considerations, it appears that more than the amount of brass shown by the inventory was delivered to the warehouseman; and being intact and in amount when so delivered, a state of things is shown to have existed, and the law presumes that state of things to continue to exist until the contrary is shown or a different presumption is raised. *Greenleaf on Evidence*, 13 ed., vol. 1, p. 50, sec. 41; 22 *Amer. & Eng. Encyc. of Law*, 1238; *Inhabitants of Hingham* v. *Inhabitants of South Scituate*, 7 Gray (Mass.) 232.

The claim of offset can not be sustained and must be rejected. The plaintiff is entitled to recover the amount claimed in its petition, and it is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

CARROLL ELECTRIC CO. v. THE UNITED STATES

[No. C-922. Decided April 2, 1928]

On the Proofs

Settlement contract; refusal to sign general release; withholding compensation.—See *McClintic-Marshall Co.* v. *United States*, 59 C. Cls. 817.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Syllabus

In settlement between plaintiff and the Government for work performed under contract, the plaintiff declined to sign a general release in favor of the Government because it had a claim, then pending, for additional compensation. The Government refused to pay the amount admittedly due and at the same time "permit" a reservation of the pending claim, unless it received as consideration for such permission 2 per cent of the amount of additional compensation claimed. A qualified release was accordingly executed, under which the Government withheld $82.84 from the amount admittedly due.

The court gave judgment for plaintiff in the sum of $82.84, and with the judgment was filed the following

MEMORANDUM BY CHIEF JUSTICE CAMPBELL

This case was referred to a commissioner of the court, to whose report there is no exception. Only one question is presented and that is upon the right of the Government to retain a deduction of 2 per centum of the amount admitted to be due as the consideration for the qualified release. The court has held that such a right does not exist in a case where the same question was presented. See *Pawling & Co. case*, 60 C. Cls. 699, 707, 712. This case was affirmed, 273 U. S. 665. See also *McClintic-Marshall Co.*, 59 C. Cls. 817. Judgment is awarded for this item.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

CHARLES K. LINCOLN, ADMINISTRATOR OF THE ESTATE OF EUDORA KNOX LINCOLN, DECEASED, v. THE UNITED STATES

[No. F-200. Decided April 2, 1928]

On the Proofs

Federal estate-transfer tax; conveyance of interest intended to take effect in possession or enjoyment at or after death; agreement to hold estate intact.—In consideration of an agreement to pay her an annuity for life, to pay certain taxes and insurance,

and to hold the former estate of her deceased husband, their father, as their joint and undivided property as long as she lived, the widow conveyed to her children her one-third interest therein, they already owning the remaining two-thirds. *Held,* that the conveyance so made transferred immediate possession and enjoyment, was for a fair consideration, and not of an interest intended to take effect in possession or enjoyment at or after the grantor's death, within the meaning of section 402, revenue act of 1918.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff was duly appointed and qualified as administrator of the estate of Eudora Knox Lincoln, late a resident of Little Rock, Arkansas, and a citizen of the United States, who died August 24, 1921, intestate, and is still acting as such administrator.

II. On or about the 10th day of May, 1922, the plaintiff as the administrator of the estate of the decedent, Eudora Knox Lincoln, duly made, executed, and filed, pursuant to the provisions of the revenue act of 1918, a return for Federal estate taxes, and on August 21, 1922, paid the taxes indicated to be due by said return in the amount of $352.37 to the then collector of internal revenue for the district of Arkansas. Thereafter, on August 24, 1923, the Commissioner of Internal Revenue, upon additional facts and information submitted to him, directed a review and audit to be made of the return of the estate of the decedent and as a result of such review and audit determined that an additional estate tax was due in the sum of $2,591.95. An estate tax in said amount was duly assessed by the said Commissioner of Internal Revenue.

III. The aforesaid additional estate tax so assessed resulted from the inclusion by the Commissioner of Internal Revenue in the gross estate of the decedent of the value of the decedent's one-third interest in certain real and personal property in the amount of $125,339.12, which the decedent

during her lifetime, to wit, on March 13, 1920, conveyed and transferred to her son and daughter. Thereafter on the same day said son and daughter made, executed, and delivered to the decedent an instrument in writing which in words and figures was as follows:

LITTLE ROCK, ARK., *March 13, 1920.*

FOR AND IN CONSIDERATION of certain transfers of realty and personalty belonging to the estate of C. J. Lincoln, this day made to us by Mrs. Eudora Knox Lincoln, we undertake and agree that we will:

(1) Pay Mrs. Eudora Knox Lincoln the sum of six thousand dollars ($6,000) per annum, payable five hundred dollars ($500) per month, in advance, as long as she shall live.

(2) Pay taxes and insurance on property owned by Mrs. Eudora Knox Lincoln as long as she shall live, to an amount not to exceed fifteen hundred dollars ($1,500) per year, as paid by her for these same purposes on the same property in the year nineteen hundred and nineteen (1919).

(3) Hold the estate of C. J. Lincoln as our joint and undivided property as long as the said Mrs. Eudora Knox Lincoln shall live.

Given under our hands this 13th day of March, 1920.

C. K. LINCOLN.
GEORGIA LINCOLN SHIPTON.

The real and personal property referred to in the foregoing instrument was the same property which the decedent on the day aforesaid transferred to the individuals who executed the said written instrument, and one-third of the value of this property was by the Commissioner of Internal Revenue included in the gross estate of the decedent. The said one-third interest so transferred by the decedent was acquired by her from the estate of her deceased husband, the other two-thirds interest being owned by the decedent's son and daughter in equal parts, they having likewise acquired their interests from the estate of the decedent's deceased husband, their father.

IV. Thereafter, to wit, on the 14th day of September, 1923, the plaintiff as said administrator duly executed and filed a claim for abatement of the aforesaid additional taxes in the amount of $2,591.95, alleging that the said transfers were not made by the decedent in contemplation of death but entirely for business reasons and with full value paid

for the property. Thereafter, to wit, on January 24, 1924, the Commissioner of Internal Revenue rejected said claim for abatement upon the ground that the said transfer was included in the gross estate of the decedent as a transfer intended to take effect in possession or enjoyment at or after the decedent's death. Whereupon the plaintiff was required to and did pay the said additional estate taxes in the amount of $2,591.95 to the then collector of internal revenue for the district of Arkansas on January 30, 1924.

V. Thereafter, to wit, on the 23d day of April, 1924, the plaintiff duly executed and filed with the collector of internal revenue for the district of Arkansas a claim for refund of said additional estate taxes in the amount of $2,591.95, and on April 24, 1926, the Commissioner of Internal Revenue rejected the said claim for refund upon the same ground that he rejected the said claim for abatement.

The court decided that plaintiff was entitled to recover $2,591.95 with interest from date of payment to date of judgment.

BOOTH, *Judge*, delivered the opinion of the court:

This is a tax case. The facts have been stipulated. The plaintiff is the administrator of the estate of Eudora Knox Lincoln, deceased. Eudora Knox Lincoln was a resident of Arkansas, and died intestate on August 24, 1921. The decedent was the widow of C. J. Lincoln, deceased, and as such had inherited from her husband certain real and personal property to the amount of $125,339.12. On March 13, 1920, Mrs. Eudora K. Lincoln conveyed to her son and daughter, C. K. Lincoln and Georgia L. Shipton, the entire inheritance she had received from her husband. On the same day and in express consideration for the transfer, C. K. Lincoln and Georgia L. Shipton executed the following written instrument, viz:

LITTLE ROCK, ARK., *March 13, 1920.*

FOR AND IN CONSIDERATION of certain transfers of realty and personalty belonging to the estate of C. J. Lincoln this day made to us by Mrs. Eudora Knox Lincoln, we undertake and agree that we will:

(1) Pay Mrs. Eudora Knox Lincoln the sum of six thousand dollars ($6,000) per annum, payable five hundred dollars ($500) per month, in advance, as long as she shall live.

(2) Pay taxes and insurance on property owned by Mrs. Eudora Knox Lincoln as long as she shall live, to an amount not to exceed fifteen hundred dollars ($1,500) per year, as paid by her for these same purposes on the same property in the year of nineteen hundred and nineteen (1919).

(3) Hold the estate of C. J. Lincoln as our joint and undivided property, as long as the said Mrs. Eudora Knox Lincoln shall live.

Given under our hands this 13th day of March, 1920.

C. K. LINCOLN.
GEORGIA LINCOLN SHIPTON.

The Commissioner of Internal Revenue, in assessing an estate tax against the estate of Mrs. Lincoln, following an audit duly made, included as part of the decedent's estate the entire value of the estate so conveyed, and levied and collected an additional estate tax of $2,591.95 by reason thereof. Subsequent to the payment thereof the administrator filed a claim for refund, which was denied, and this suit followed to recover the above amount.

Section 402 of the revenue act of 1918, 40 Stat. 1097, provides, in part, as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real and personal, tangible or intangible, wherever situated—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, * * * intended to take effect in possession or enjoyment at or after his death * * * except in a case of a bona fide sale for a fair consideration in money or money's worth."

The sole issue in this case is whether the transfer made as described was intended to take effect in possession and enjoyment after death or constituted a bona fide sale for a fair consideration in money or money's worth. In the solution of this issue we think it essential to not only consider the transaction from a mere paper aspect, but recourse must be had to the situation of the parties at the time the papers were executed and what was the real intent of the parties with reference to their execution. If it was the intention of the decedent to completely and irrevocably divest herself of

all title, interest, and control of the property conveyed, the transaction is a sale.

No charge of bad faith or attempt to evade taxation is made. Two factors disclosing intent, and from which a legitimate inference of the purpose of the transfer may be made, are, first, an absolute conveyance of the property which the decedent had inherited from her deceased husband, and, second, the contract to receive annually as consideration therefor the sums mentioned in the contract, constituting a closed transaction, one not dependent upon any future contingency or event. True, the grantees agreed to hold the entire estate of the late C. J. Lincoln as their joint and undivided property so long as the mother lived, but this obligation created in this wise and for this especial transaction did not postpone the vesting of title to the grantees until the mother's death. It was in part consideration for the transfer, a contractual obligation to do a certain thing, or rather to refrain from doing a certain thing as security for the performance of the obligations of a contract. Assuredly it is not to be claimed that Mrs. Lincoln did not immediately divest herself of all title, right, or interest in the property conveyed. Beyond all doubt that was her intent. Having confidence in her children, to whom the property would eventually go, she wished to be freed from its control, to vest title in her children, providing only for the annuities to be paid her during life. The children were put into immediate possession and enjoyment of the estate; they were free to use it as their judgment dictated; and if the income therefrom exceeded the sums to be paid the mother annually, the excess was their property. Treated as a trust, immediate possession and enjoyment exempts the property from taxation, and treated as a bona fide sale accomplishes the same result.

The defendant contends that the self-imposed obligation on the part of the grantees to hold the property in joint and undivided ownership necessarily postpones the vesting of absolute title and dominion over the property until after the mother's death; that in effect it is a reservation of interest and title to the property which renders the transaction as one of a testamentary character. The agreement of the

children, construing the conveyance and the agreement as one transaction, discloses that not only the property transferred by the mother was to be so held, but their own inheritance, twice as much in value, from the father, was included in the so-called restriction. Surely it may not be contended that the mother acquired by the transaction any title to the children's two-thirds interest included in the agreement. In our view of the situation the children's agreement amounted to no more than an express pledge, a security provision, to assure the grantor that the contract to pay the amount so stipulated would be faithfully and fully executed. A breach of the contract on the part of the children would not reinvest title in the mother. Her remedies in the event of a breach are too well established to warrant citation. So far as the grantor was concerned, by the transaction she was legally divested of title to the real and personal property conveyed, as though she had made the conveyance independently of the contract. As said by the Supreme Court in *Shukert* v. *Allen*, 273 U. S. 545–547: "Of course, it was not argued that every vested interest that would manifestly take effect in actual enjoyment after the grantor's death was within the statute."

Was the transfer made for a "fair consideration in money or money's worth"? It is conceded that the sums to be paid by the children to the mother amounted to six per centum per annum upon the value of the property conveyed. It is true the mother parted with the *corpus* of the estate. What her age was or the date of the transfer is not shown. Keeping in mind the contemplated purpose of the transaction, a family disposition of the assets of a deceased husband and father, a mutual wish that the children should take immediately the property in consideration of a provision for the mother's support, it would be difficult indeed to hold the consideration inadequate. Manifestly it has none of the characteristics of a gift *inter vivos*, and the sums to be paid under the children's agreement were fair, just, and in nowise disproportionate to the property received.

We think the case falls within the decision announced in the following cases: *Ferguson* v. *Dickson*, 300 Fed. 961 (certiorari denied, 266 U. S. 628); *Polk* v. *Miles*, 268 Fed. 175;

Shukert v. *Allen*, *supra*, and that the plaintiff is entitled to recover.

Judgment for plaintiff. It is so ordered.

Moss, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

NEW RIVER COLLIERIES CO. AND CHESAPEAKE & OHIO COAL AND COKE CO., SELLING AGENTS OF THE NEW RIVER COLLIERIES CO., TO THE USE OF THE NEW RIVER COLLIERIES CO. v. THE UNITED STATES

[No. B-170. Decided April 2, 1928]

On the Proofs

Eminent domain; acts of March 4, 1917, and June 15, 1917; order for coal upon sales agent; right of mining company to sue for just compensation; acceptance of prices fixed under Lever Act.—An order for coal, given by the Navy Department under the acts of March 4, 1917, and June 15, 1917, to a company acting as sales agent for mining concerns, was not obligatory upon the company that mined the coal, and the mining company is not the proper party plaintiff in a suit for just compensation. Before the sales agent can maintain suit, the procedure prescribed by the acts of March 4, 1917, and June 15, 1917, must be observed, and acceptance in full of the prices fixed by the Fuel Administrator under authority of the Lever Act (act of August 10, 1917) is acquiescence in the compensation so determined and precludes recovery of any further amount.

The Reporter's statement of the case:

Mr. Ira Jewell Williams for the plaintiff. *Messrs. Ira Jewell Williams, jr., Charles L. Guerin, Francis R. Foraker,* and *Francis Shunk Brown* were on the briefs.

Mr. James J. Lenihan, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Dan M. Jackson* was on the briefs.

Messrs. Edgar T. Beamish, J. Harry Covington, and *Spencer Gordon*, and *Covington, Burling & Rublee* filed a brief as *amici curiae.*

The court made special findings of fact, as follows:

I. The New River Collieries Company, plaintiff herein, was at the time of the different transactions set out in these findings of fact a corporation duly organized under the laws of the State of New Jersey, having its principal office or place of business at 120 Broadway, New York City, in the State of New York, and engaged in the production of bituminous coal in Raleigh and Fayette Counties, West Va. On September 15, 1923, the New River Collieries Company sold its physical properties and is no longer an operating company, but is still in existence.

II. The Chesapeake & Ohio Coal and Coke Company is now, and was at the times hereinafter mentioned, a corporation existing under the laws of the State of West Virginia and having its principal place of business at 120 Broadway, New York City. The Chesapeake & Ohio Coal and Coke Company, sometimes in these findings referred to (for brevity) as the Chesapeake Company, was organized prior to the organization of the New River Collieries Company and it had a good will in the coal business, which was thought to be valuable.

III. The Chesapeake & Ohio Coal and Coke Company was the sales agent of the New River Collieries Company and also was sales agent for other companies. The New River Collieries Company did not sell its coal direct to consumers or the public. The Chesapeake Company sold, shipped, and delivered all of the coal mined by the New River Collieries Company and received all of the compensation therefor from the purchaser. The terms upon which it accounted to the owner of the mines do not appear. They had substantially the same board of directors and officers. The Chesapeake Company itself owned no mines and produced no coal. It bought coal from others and sold the same. The coal which is the subject matter of this suit was produced from its own mines by the New River Collieries Company.

Prior to the order of June 14 the Chesapeake Company had entered into one or more contracts with the Navy Department for the furnishing of coal and the same had been furnished. The New River Collieries Company had never made a contract with the Navy Department.

On March 20, 1918, the Chesapeake & Ohio Coal and Coke Company applied to the United States Fuel Administration for a license to engage in and carry on the business of distributing coal and coke, and the correctness of the statements therein was sworn to by the president of said company. Among the statements in said application was one that the said company had "no interest in any mine" and another that "no stockholder in this company owns any interest in any mine producing coal." On April 12, 1918, license No. X–01129 was issued to said company "to engage in and carry on the business of distributing coal and coke pursuant to the proclamation of the President dated March 15, 1918, and the rules and regulations prescribed by him relating to such business."

During the period from July 4, 1917, to June 28, 1919, the Chesapeake & Ohio Coal and Coke Company applied for and received from the War Trade Board a large number of export permits, in the aggregate 110 permits, for the exportation of coal and under the authority of which permits that company exported coal to the amount of 610,500 gross tons. This tonnage exported under said permits was exported by the Chesapeake & Ohio Coal and Coke Company from Hampton Roads.

IV. On June 14, 1917, the Secretary of the Navy wrote to the Chesapeake & Ohio Coal and Coke Company, which letter was received, as follows:

"Effective at once please be prepared to furnish your proportion of the total quantity of coal required by the Navy for the period ending September 30, 1917; it being estimated that the tonnage which will be taken from your company during that period will amount to about 14,000 tons; delivery being required at the following-named points:

"Navy Standard Mines, W. Va., 14,000 tons.

"The coal furnished will be from mines now on the Navy acceptable list.

"The price to be paid for such tonnage as you may be required to deliver is to be determined later, and as the result of this department's decision as communicated to the Committee on Coal Production, Council of National Defense, will be contingent on the cost of production, data concerning which are now being prepared. As an advance payment, however, this department will allow the unit of two dollars

thirty-three and one-half cents ($2.335) per gross ton, f. o. b. mines—although it is to be understood that any payments made at this rate will be subject to such increases or decreases as may be later decided upon as proper by reason of the ultimate decision with respect to cost of production, plus such reasonable profit as may be allowed.

"It will also be understood that the figure finally agreed upon as a proper amount to be paid your company will be subject to such increase or decrease in transportation or labor costs as may be exacted of you during the period of the formal contract.

"In making the allotments described herein every effort has been made to treat all suppliers equitably—consideration being given to the questions of production, convenience of transportation, and other governing factors. However, in view of the inability to reach a definite agreement as a result of the several conferences held on this subject, it has not been practical to as yet investigate as thoroughly as might be desired, so that if it is found a possible injustice has been done to any supplier, upon receipt of satisfactory evidence bearing out such contention, steps will be taken to remedy same in subsequent allotments in the best interests of all concerned. The forms of delivery required are to be those stated under the various classes of the within schedule allotted to your company.

"It is probable that deliveries under this order may be required in the immediate future, and you will, therefore, make all necessary preparations to meet such deliveries as may be called for, on which it may be necessary to make telegraphic assignments."

V. During the period involved in this action, and for some years prior, the Navy Department of the United States maintained a list of mines known and designated as the "Navy acceptable list." This list contained the names and locations of all mines, the production of which had been inspected and tested by the Navy Department, and had been found to be up to the Navy Standard and fit for use by the Navy Department. Eccles mines 3, 5, and 6, Raleigh County, West Virginia, and Sun mines 1 and 2, Fayette County, West Virginia, were placed in 1916 on the Navy acceptable list, which also gave the Chesapeake Co. as the sales agent. These mines were at the time owned by the New River Collieries Company.

All of the coal involved in this action came from Sun mines Nos. 1 and 2 and Eccles mines Nos. 3, 5, and 6.

VI. On June 15, 1917, the Paymaster General of the Navy sent the following telegram to the Chesapeake Company:

"Referring Secretary's letter fourteenth instant please immediately direct your representative at mines to resume all rail shipment Tiburon."

VII. On June 22, 1917, the Paymaster General sent the following telegram to the Chesapeake Company:

"Attention invited this department's telegram of nineteenth instant. Inspector again advises your operators have received no instructions to resume all rail shipments. Attention also invited Secretary Navy's letter dated fourteenth June, which was prepared under authority acts approved four March and fifteen June, nineteen seventeen, and it is hoped will not be necessary impose penalty prescribed in those acts by reason your refusal to comply with order placed your company. Immediate reply is requested."

On the same day the said Chesapeake Company replied as follows:

"Your telegram June twenty-second. We have no contract with Navy Department and have not agreed to supply coal at less than a very fair price of two dollars ninety-five cents. Did not understand Secretary's letter June fourteenth to be an order issued pursuant to authority of two acts mentioned your telegram. Letter refers to no act of Congress and was written before one of the acts was passed. It is requested that you give reference to penalties prescribed in two acts referred to your telegram."

On the following day, June 23, 1917, the Paymaster General wired the Chesapeake Company that the Secretary's letter of June 14, 1917, constituted a formal demand for coal, and that the acts of March 4 and June 15, 1917, provided that the penalty for failure to comply with the Government's request would be "possession of your property by Government." This telegram further stated that the company would be expected to make up all delinquencies, and that in view of delays then occurring no consideration could be given on account of embarrassment which might result later because of increased tonnage to maintain specified weekly deliveries. On June 25, 1917, the Chesapeake Company wired the Paymaster General that in view of his statement

that the letter of June 14, 1917, was a formal demand under the acts of March 4 and June 15, 1917, the company would comply and furnish the tonnage stated in that letter under protest, on the ground that the price the Government proposed to pay was unreasonable, inadequate, and unfair, and that it would reserve "all its rights under such laws." On June 27, 1917, the said Chesapeake Company wrote to the Paymaster General confirming the telegram of June 25, 1917, and again protested against "the price and conditions suggested by the Government as unreasonable, inadequate, and unfair" and against the amount of coal demanded as in excess of the tonnage it should be called upon to supply, and gave notice that it reserved its rights under the laws quoted by the Paymaster General. On June 28, 1917, the Paymaster General notified said Chesapeake Company by wire that it should resume shipments of the 14,000 tons assigned to it at the rate of 1,500 tons weekly. On June 29, 1917, the said Chesapeake Company stated that it would begin shipping inland west to the extent of the tonnage specified in the Secretary's letter of June 14, 1917, in approximately weekly proportions and under protest as to price and conditions, as stated in telegram of June 25 and letter of June 27, 1917. On July 3, 1917, the said Chesapeake Company wrote to the Secretary of the Navy acknowledging the receipt of his letter of June 14, 1917, advising him that it had notified the department of supplies that it considered there had been a confiscation of its coal and objecting to the price designated as inadequate and unfair and the amount of coal assigned as more than its share, considering the production of all the mines. On July 6, 1917, the said Chesapeake Company notified the Navy supply officer at Norfolk, Virginia, that the coal it was furnishing to the Navy Department was not being supplied under any contract with the department but in obedience to the orders and demands made upon it by the Secretary. On July 7, 1917, the Secretary of the Navy wrote to the Chesapeake Company that no price had been fixed for coal in the letter of June 14, 1917; that the unit of $2.335 per gross ton referred to therein was an advance payment, subject to increase or decrease, as might be decided upon after investigation as to the cost of production, etc.

VIII. On July 26, 1917, the Paymaster General of the Navy notified the Chesapeake Company that the Navy Department was then preparing "Navy Order N–76" to confirm and supplement the Secretary's letter of June 14, 1917, and called attention to the fact that the price mentioned in the Secretary's letter of June 14, 1917, was "f. o. b. mines," and requested information from the company as to additional charges per ton covering in detail the cost of delivery to final destination, so that such items could be included in the proposed Navy order. The company protested that it should not be obliged to pay freight charges, and under date of August 13, 1917, the Paymaster General advised the company that in view of the fact that it was then making deliveries f. o. b. mines, it would not have to heed the letter of July 26, 1917, and stated that if the company should be requested to make deliveries at Tidewater it would be necessary for the company to then furnish information as to freight charges.

IX. On August 16, 1917, the Paymaster General of the Navy forwarded to the Chesapeake Company a document dated August 9, 1917, designated "Navy Order N–76," and signed by him and the same was received by said company on August 17, 1917. Among other things said Navy order states that (1) pursuant to the provisions of the acts of Congress, naval appropriation act of March 4, 1917, and the urgent deficiency act of June 15, 1917, acting under the direction of the President, "an order is hereby placed with you under the condition stated in subparagraph B (subparagraph A is eliminated) to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for."

Subparagraph B of said Navy Order N–76 provides as follows:

"(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order, and as an advance payment you will be paid the unit prices

stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper.

"2. Deliveries are required to be made, in whole or in part, as soon as possible and before the expiration of the time limit as stated herein. Delivery will be made to (see below) by Sept. 30, 1917, the time allowed for deliveries counting from June 14, 1917.

"3. Dealers' bills are to be sent to supply officer of shipyard, or station involved, who is authorized to prepare vouchers in payment. Payments will be made only by the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

"4. If this order is based on deliveries f. o. b. works, your material can not be shipped except under orders from the naval inspecting officer for your district, and then only under a Government bill of lading to be furnished by that officer, in which case transportation charges must not be prepaid."

It is also provided in said Navy order that it confirms and supplements the letter from the Secretary of the Navy dated June 14, 1917, which is made a part of the order, and that the Chesapeake Company would be requested to furnish approximately 14,000 tons of coal at $2.335 per gross ton, f. o. b. mines, to be delivered at Navy standard mines, West Virginia; also that transportation and other charges connected with the handling of the coal should be included in the company's bills to the Navy Department.

A printed statement following the signature on this order that "The above order is accepted subject to the conditions in paragraph b above" was not signed by the Chesapeake & Ohio Coal and Coke Company.

On the reverse side of Navy Order N-76, as well as on the reverse side of the other Navy orders in these findings mentioned, appear extracts from the said acts of March 4, 1917, and June 15, 1917, and also conditions covering specifications, inspection of material to be delivered, etc., not material here.

X. On August 21, 1917, the President of the United States issued the following Executive order:

"By virtue of authority vested in me in the section entitled 'Naval Emergency Fund' of an act of Congress entitled 'An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes,' approved March 4, 1917, and in the section entitled 'Emergency shipping fund' of an act of Congress entitled 'An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved June 15, 1917, I hereby direct that the Secretary of the Navy shall have and exercise all power and authority vested in me in said sections of said acts, in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for construction of vessels for the Navy and of war materials, equipment, and munitions required for the use of the Navy and the more economical and expeditious delivery thereof.

"The powers herein delegated to the Secretary of the Navy may, in his discretion, be exercised directly by him or through any other officer or officers who, acting under his direction, have authority to make contracts on behalf of the Government."

Any authority of the Secretary of the Navy or the Navy Department or official thereof to place the orders, or to requisition coal mentioned in these findings, was that granted by the foregoing Executive order of August 21, 1917, and not otherwise, except as the same may be affected by the other Executive orders mentioned in these findings. The Secretary's order of August 14 was not complied with until after the issuance of Navy Order N-76.

XI. On August 21, 1917, the President issued an Executive order under the act of August 10, 1917, 40 Stat. 276, prescribing the scale of prices for bituminous coal-producing districts in the United States. The order declared it was provisional only and subject to change. The prices so fixed were changed from time to time in the several districts (see

General Orders, Regulations, and Rulings of the United States Fuel Administration). The price thus prescribed for run-of-mine "West Virginia" and "Virginia" coal was $2.00 per net ton f. o. b. mines, or $2.24 per gross ton f. o. b. mines. The price prescribed for run-of-mine "West Virginia (New River)" coal was $2.15 per net ton f. o. b. mines, or $2.408 per gross ton f. o. b. mines.

XII. On August 23, 1917, the President of the United States issued an Executive order appointing Dr. H. A. Garfield United States Fuel Administrator by virtue of the power conferred upon the President under the said act of Congress approved August 10, 1917 (Lever Act). Said order directed the Fuel Administrator to carry into effect the provisions of the Lever Act and the powers and authority therein given to the President so far as the same applied to fuel, as set forth therein.

The order further stated "all departments and established agencies of the Government are hereby directed to cooperate with the United States Fuel Administrator in the performance of his duties as hereinbefore set forth."

On October 27, 1917, the President issued an Executive order, effective October 29, 1917, amending his Executive order of August 21, 1917, as adjusted and modified by order of the United States Fuel Administrator, by adding the sum of $0.45 per net ton, or $0.504 per gross ton f. o. b. mines, to the prices so prescribed in the Executive order of August 21, 1917. On December 13, 1917, Dr. H. A. Garfield, Fuel Adminstrator, issued an order providing that the maximum price of bituminous coal sold and delivered to vessels for foreign bunkering purposes, or for export to foreign countries (except Canada and Mexico), should be the price prescribed for such coal at the mine at the time such coal left the mine, plus transportation charges from the mine to the port of loading, plus $1.35 per net ton, or $1.512 per gross ton, and that to this price there might be added the customary and proper charges, if any, for storage, towing, elevation, trimming, special unloading, and other port charges. On April 19, 1918, the United States Fuel Administrator issued an order effective April 20, 1918, directing that bituminous run-of-mine coal might be sold at a price not to

exceed $0.20 per net ton or $0.224 per gross ton, f. o. b. mines, higher than the then existing prices as theretofore established. On May 24, 1918, the United States Fuel Administrator issued an order effective May 25, 1918, reducing the price of bituminous coal $0.10 per net ton or $0.114 per gross ton f. o. b. mines.

XIII. On August 21, 1917, the Chesapeake Company addressed a letter to the Paymaster General of the Navy and inclosed Navy Order N–76, stating that the company refused to sign said order, for the reason that it considered the Secretary's letter of June 14 a demand, or practically a confiscation of the coal, and that under such conditions the company would supply the same, but that said Navy Order N–76 was not necessary and that it contained certain provisions or terms to which the company was not willing to subscribe. Much correspondence passed between the Navy Department and the Chesapeake Company in reference to the signing and acceptance of Navy Order N–76, and said Navy order was returned by the Paymaster General of the Navy to the company.

On September 13, 1917, the Secretary of the Navy sent a telegram to the Chesapeake Company, referring to the current Navy allotment for coal, advising the company, in order that it might be guided in connection with prospective obligations, that it would also receive an allotment for the period of six months subsequent to September 30, the proportionate tonnage under which might be slightly increased over that to be delivered under the current allotment.

On September 24, 1917, the Paymaster General of the Navy sent a letter to the Chesapeake Company requesting that it return Navy Order N–76 signed, and stated that if the company objected to signing it to return it unsigned. On September 25, 1917, the Chesapeake Company again returned Navy Order N–76 unsigned to the Navy Department. In said letter the Paymaster General referred to authority previously given to change the form previously required on bills from "Certified correct and just. Payment not received" to the new form of "Prices are certified to be those as stated in Navy Order No. —. Payment not received," as having been given in order to eliminate the

possibility of any qualification of the Chesapeake Company's interests through the use of the first certificate.

XIV. The Chesapeake Company protested against being compelled to pay freight charges on the coal, because of the fact that it was being furnished f. o. b. mines.

The Secretary of the Navy, on September 17, 1917, wrote to the Chesapeake Company as follows:

"Replying to your letter of the 5th instant, in which attention is called to the fact that this department's letter of June 14, 1917, calls upon your company to deliver coal f. o. b. mines, whereas Navy Order N-76 implies that you may be required to deliver at other points, attention is invited to the statement 'confirming and supplementing letter from the Secretary of the Navy dated June 14, 1917,' appearing on Navy Order N-76, under which it will be seen that your company may properly be called upon to make deliveries other than f. o. b. mines.

"As far as the question of prepayment of freight is concerned, such coal as may be ordered for delivery other than f. o. b. mines will be delivered to destination required; all freight charges, lighterage, and other expenses incident thereto to be paid by your company. This procedure is the same as that applying to all suppliers of Navy standard coal, and it would not appear that the practice works any material hardship, as the freight charges and other incidental expenses are outstanding for only a comparatively short time; reimbursement being promptly made to cover all charges incident to delivery to final destination, as noted in the Navy order referred to."

The question asked by the said company in its letter of September 5, 1917, referred to in the letter of the Secretary, was: "Can we be required to advance funds for payment of rail freight, etc., on coal requisitioned by the Navy? We referred to your letter of June 14, 1917, which required delivery 'At mines,' whereas Navy Order N-76 implies that we may be required to deliver at other points. In our opinion, your letter did not intend to impose this burden upon us; in fact, we question whether such a requirement could be made under the act empowering the President to requisition coal. We have endeavored to put our question more clearly than before. Will you let us have a ruling as soon as you can conveniently do so?"

XV. Under date of September 22, 1917, the Navy Department issued to the Chesapeake Company a document

designated "Supplementary Navy Order N-76," received on September 27, 1917, as follows:

"1. Pursuant to the provisions of the acts of Congress, naval appropriation act approved March 4, 1917, and the urgent deficiency act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subparagraph a (subparagraph b is eliminated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory and no commercial orders shall be allowed by you to interfere with the delivery herein provided for.

"(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

"(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper.

"(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b),

original is to be signed and returned. The duplicate copy may be retained by you in either case.

"2. Deliveries are required to be made, in whole or in part, as soon as possible and before the expiration of the time limit as stated herein. Delivery will be made to (see below) by 30 June, 1918, the time allowed for deliveries counting from 1 October, 1917.

"3. Dealers' bills are to be sent to supply officer, ship, yard or station involved, who is authorized to prepare vouchers in payment. Payments will be made only by the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

"(a) In forwarding bills, the original bill must bear the following certificate: 'Prices are certified to be those as stated in Navy Order No. 76; payment not received.'

"4. If this order is based on deliveries f. o. b. works, your material can not be shipped except under orders from the naval inspecting officer for your district, and then only under a Government bill of lading to be furnished by that officer in which case transportation charges must not be prepaid.

"5. The conditions appearing on the reverse side hereon are made a part of this order.

"6. Subparagraph (a) of paragraph 1 above is hereby modified to the effect that the prices as herein stated are subject to change from time to time under proper governmental authority; it to be understood that any change in prices—if not retroactive—will apply on the delivery of tonnage made immediately subsequent to the date on which such new prices become effective, provided the contractor is not delinquent on the particular delivery in question, in which latter event the old prices will apply; if subsequent published prices are held by proper authority to be retroactive, such price adjustments as may be necessary on deliveries already made may be proceeded with under this order.

"7. In the case of delivery of bituminous coal, the conditions and details with respect to specifications, forms of delivery, etc., will, in general, be those outlined in schedules 932 or 933—or both, as might apply—copies of which schedules are attached hereto. Anthracite coal will comply with the following specifications: To be best quality, dry, free from dust, dirt, slack and slate, or other foreign substances; to be paid for at the rate of 2,240 pounds to the ton, weighed on Government scales.

"8. The kinds and approximate quantities of coal covered by this order are:

Gross tons	Kind of coal	Price per gross ton f. o. b. mines	For delivery at—
50,000	U. S. Navy standard	(*)	F. o. b. cars, mines.
31,000	U. S. Navy standard	(*)	Newport News, Va.

*If from mines in district designated "West Virginia," $2.24 (R. O. M.).
*If from mines in district designated "West Virginia" (New River), $2.408 (R. O. M.).
*If from mines in district designated "Virginia," $2.24 (R. O. M.).

"(This order will also apply on deliveries from such mines as may later be admitted to the U. S. Navy Standard list of mines.)

"9. Orders for delivery of the above-mentioned fuel may be placed either by the Bureau of Supplies and Accounts or through usual naval channels.

"10. The supplier will be allowed reimbursement for expenses actually incurred in connection with transportation, lighterage, hauling, skidding, leveling, switching, carrying, wheeling, trimming, bunkering, storing, etc., and will be allowed other proper charges required to effect the form of delivery called for; all such charges to be itemized on the bills submitted, in each special case, for the fuel supplied; and such services shall be certified to as actually required and obtained at reasonable rates. The foregoing incidental expenses to be subject to the approval of the supply officer or other proper naval authority, except that in the case of prices covered by tariffs issued under authority of the Interstate Commerce Commission it will be necessary only to make proper reference on the dealer's bills to the particular tariff concerned, showing points of origin and delivery. The suppliers' invoices, in addition to showing the quantity and kind of coal actually delivered, will also specifically state the district in which the coal originates in order that the unit of price may be properly identified.

"11. This order is issued after consultation with the U. S. Fuel Administrator."

The printed statement "The above order is accepted subject to the conditions in subparagraph (a) above," following the signature of the Paymaster General, was not signed. On March 9, 1918, the Paymaster General of the Navy addressed a letter to the Chesapeake Company requesting that supplementary Navy Order N-76 be properly executed as soon as possible and forwarded to the Paymaster General, United States Navy; and notified the company that it would not be possible to make any payments applying on the order until

after it had been received by the Navy Department properly signed. Supplementary Navy Order N-76 was on the same printed form as N-76, known as N. S. 550. The Chesapeake Company did not sign supplementary Navy Order N-76.

XVI. On January 3, 1918, the Paymaster General sent a telegram to the Chesapeake Company, advising that in confirmation of action taken through the Tidewater Coal Exchange, a formal assignment was thereby placed covering fifteen hundred tons of Navy standard coal, diverted from Pool One into Navy storage at Newport News from December 15, 1917, to January 1, 1918, and charged against the account of the Chesapeake Company, and for which no order had theretofore been placed by the Navy Department.

XVII. Under date of June 15, 1918, the Navy Department issued to the Chesapeake Company a form similar to supplementary Navy order N-76, designated "Navy Order N-3005," calling for the delivery by June 30, 1919, of coal as follows:

Gross tons	Kind of coal	Price per gross ton f. o. b. mines	For delivery at—
160,000	"Navy Standard"	Hampton Roads (*) (†)	Newport News, Va.
40,000	"Navy Standard"	Hampton Roads (*) (†)	Sewall's Point, Va.

(*) If from mines in district "West Virginia," $2.632 (R. O. M.).
(*) If from mines in district "West Virginia-Tug River," $3.08 (R. O. M.).
(*) If from mines in district "West Virginia-New River," $3.024 (R. O. M.).
(*) If from mines in Pocahontas district "Virginia," $2.632 (R. O. M.).
(†) And Lambert's Point, Va., if required.

There was a provision contained in said order to the effect that "this order is issued in accordance with requirements of, and in thorough cooperation with, the United States Fuel Administrator." This order contained a printed statement at the foot thereof that "The above order is accepted subject to the conditions of subparagraph (a) above," which was not signed.

The Chesapeake Company refused to sign "Navy Order N-3005."

XVIII. The Chesapeake & Ohio Coal and Coke Company delivered to the Navy Department at Hampton Roads, Va., for use on Government vessels 235,724.86 gross tons of coal, and also delivered f. o. b. cars Hampton Roads, Va., for the

Navy storage plant 10,370.81 gross tons of coal. That company also delivered to the Navy Department at the mines of plaintiff in West Virginia 27,420.28 gross tons of coal and shipped same by rail to the Navy storage plant at Tiburon, Calif. Of this latter amount 8,881.11 gross tons were delivered by the Chesapeake & Ohio Coal and Coke Company to the Navy Department at the mines in West Virginia prior to August 21, 1917.

The coal mentioned above, namely, 235,724.86 gross tons, was delivered at Hampton Roads for use on vessels and was paid for as follows:

Order	Gross tons	Amount paid for coal	Amount paid for freight	Total
Navy Order N-76	717	$1,847.00	$1,075.50	$2,922.50
Supplementary Navy Order N-76	70,623.83	215,709.17	105,935.87	321,645.04
Navy Order N-3005	164,384.03	497,097.33	317,757.30	814,854.63
	235,724.86	714,653.50	424,768.67	1,139,422.17

For the 10,370.81 gross tons delivered at the Navy storage plant the Government paid $31,363.93 and freight thereon $19,685.66, making a total of $51,049.59.

For the 27,420.28 gross tons shipped to Tiburon, Calif., a part thereof, 10,732.54, was delivered under Navy Order N-76 and the Government paid therefor $27,647.04, and for 16,687.74 gross tons thereof delivered under supplementary Navy Order N-76 the Government paid $47,835.90, making a total of $75,482.94.

The Government paid a total of $821,500.37 for coal and for freight thereon $444,454.33, making an aggregate of $1,265,954.70.

The payments mentioned above were made in each case to the Chesapeake & Ohio Coal and Coke Company.

The Government also paid on account of the coal delivered for use on vessels at Hampton Roads, for trimming charges, war tax on freight, and other items, the sum of $29,486.39.

The United States has paid the Chesapeake & Ohio Coal and Coke Company the sum of $1,265,954.70 for the coal involved in this action. These payments were made by the Government on the basis of the invoice price as shown on

the face of the invoices rendered the Government as aforesaid.

The prices paid were in each instance those prescribed from time to time by the Fuel Administrator. The dates of the delivery of the several shipments and the quantities are shown in exhibits to the petition.

XIX. During the time that shipments were being made to Tiburon, California, the Government maintained inspectors at the mines, who inspected each car of coal so shipped. While shipments were being made to Tidewater, inspectors were there occasionally, and while there inspected each car of coal that was shipped.

XX. All of the coal shipped by the Chesapeake Company, as aforesaid, was received and used by the Government of the United States.

XXI. The Chesapeake Company rendered invoices for all of the coal delivered and placed thereon a certificate, wherein it was certified that the amount stated therein was correct and just and that payment had not been received. These invoices were on a printed form reading as follows:

120 BROADWAY, NEW YORK, N. Y. (Date.)

NAVY DEPARTMENT,

Bureau of Supplies and Accounts, Washington, D. C.

Bought of The Chesapeake & Ohio Coal & Coke Co.

(Selling agents New River Collieries Co.)

New River Admiralty Smokeless Coal.

Terms: Invoice No. ______

(Description of coal furnished.) Order No. ______

(Certificate required by Navy Dept.)

Loaded into:

Payable in New York Exchange, at 120 Broadway, N. Y.

The certificates on the printed form of invoice were changed from time to time, some of them showing that the coal was furnished in accordance with the price stated in Secretary Daniels' letter of June 14, 1917, others showing that the prices as certified were those as stated in the Navy orders, and again others showing that the prices stated therein were based on the provisional prices prescribed in the President's proclamation of August 21, 1917.

XXII. The Navy Department forwarded to the Chesapeake Company approved public bills, upon which payments

were made by the Government to that company. These public bills were identical in form, and on each one the printed words "Contract No." were deleted by a series of typewritten crosses, and above the deletion was typed the insertion "Navy Order N–76," "Supplementary Order N–76," and "Navy Order N–3005," during the periods covered by the respective orders. Except as herein stated, neither the President of the United States, nor anyone acting on his behalf, ascertained and determined just compensation for the coal involved herein, and it does not appear that the Chesapeake Company applied to the President or his agency to determine the same.

XXIII. The domestic market value of the 235,724.86 gross tons of coal delivered at Hampton Roads, Virginia, as described in Finding XVIII, was $1,115,222.35 as of date of delivery. There was paid to the Chesapeake & Ohio Coal and Coke Company by the Government for said coal $1,139,-422.17, which included the advance prices stated in the different Government orders and the freight and cost of handling the coal. The difference between the domestic value of said coal and the amount paid by the Government was $24,199.82 in favor of the Government.

The domestic market value of 10,370.81 gross tons of coal delivered at Hampton Roads, Virginia, as described in Finding XVIII, was $51,066.89 as of date of delivery. There was paid to the Chesapeake & Ohio Coal and Coke Company by the Government for said coal $51,049.59, which included the advance prices stated in the different Government orders for said coal and the freight and other costs of handling the coal. The difference between the domestic market value of said coal and the amount paid by the Government was $17.30 in favor of said company.

The domestic market value of the 27,420.28 gross tons of coal delivered to the Navy Department at the mines in West Virginia was $92,904.93 at the date of delivery. There was paid to the Chesapeake & Ohio Coal and Coke Company by the Government for said coal $75,482.94. The difference between the domestic market value of said coal and the amount paid by the Government was $17,421.99.

The domestic market value of 8,608.70 gross tons of coal delivered to the Navy Department at the mines in West Virginia prior to August 21, the date of the President's Executive order authorizing the Secretary of the Navy to exercise the powers conferred by the acts of March 4, 1917, and June 15, 1917, was $30,027.15 at the date of delivery. There was paid to the Chesapeake & Ohio Coal and Coke Company by the Government for said coal $20,349.83. The difference between the domestic market value of said coal and the amount paid by the Government was $9,677.32 in favor of said company.

There was a market for coal for export purposes at and near Hampton Roads during the period in which the coal involved herein was delivered, and there was a market price obtaining therefor, which was $1.512 higher per ton than the domestic market price.

If such market price for bituminous coal for export to foreign countries and for foreign bunkering purposes, during the period in which the coal involved herein was delivered, be applied to the 235,724.86 gross tons of coal delivered as aforesaid at Hampton Roads to the Navy Department for vessels and barges, the market value of the coal was $1,471,-638.34.

If such market price be applied to the 10,370.81 gross tons of coal delivered at Hampton Roads for the Navy storage plant at Norfolk, Va., the market value of the coal was $66,746.55.

If such market price be applied to the 27,420.28 gross tons of coal delivered to the Navy Department at mines in West Virginia, the market value of the coal was $134,364.39.

XXIV. Several letters and telegrams were sent to the Chesapeake Company by the Paymaster General of the Navy informing the company that unless the company signed the Navy orders and returned same to the Navy Department no payments would be made for the coal delivered. In answer to these letters the Chesapeake Company stated that it considered that the orders gave the company the right to question the price and that the company would not sign the orders. Some time thereafter a check was delivered to the Chesapeake Company, without an accompanying letter, pay-

ing for the largest portion of the coal that had been delivered to the Navy Department. This check was cashed by the Chesapeake Company, and thereafter other checks, paying for the coal delivered on the basis of the invoice price, were received and cashed regularly by the Chesapeake Company. The last payment was made July 23, 1919. The amount paid to the said company is 100 per cent of the advance prices named in the Navy orders, as amended by the various orders referred to, together with such freight and handling charges on coal shipped from the mines to Hampton Roads as were paid by the Chesapeake Company.

XXV. The prices claimed for all coal delivered to the Navy Department at Hampton Roads include the freight on such coal from mines in West Virginia to Hampton Roads. The export prices claimed for the 27,420.28 gross tons delivered to the Navy Department at the mines in West Virginia do not include any freight charges, such coal having been shipped by rail from the mines in West Virginia to Tiburon, California, and the Government having paid the freight charges on the same.

XXVI. All of the coal involved in this suit was mined by the New River Collieries Company from its mines in West Virginia and belonged to it. When and as cars were furnished by the railroad company, it was loaded. The deliveries were as hereinbefore stated.

XXVII. In March, 1924, the Chesapeake & Ohio Coal and Coke Company executed an agreement, which has been filed in this case and is as follows:

"Whereas, The New River Collieries Company, a corporation organized and existing under the laws of the State of New Jersey, has heretofore instituted proceedings or suit against the United States of America in the United States Court of Claims for the recovery of just compensation for coal commandeered by the Navy Department of the United States from the said The New River Collieries Company during the period beginning on July 6th, 1917, and ending on June 30th, 1919, such proceeding or suit having been instituted by the filing of a petition No. B–170, in the said United States Court of Claims, and a first and second amended petition, bearing the same petition number, having heretofore been filed in the said proceeding or suit; and

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"Whereas, the said coal so commandeered belonged to The New River Collieries Company, but was commandeered in pursuance of commandeering orders addressed to The Chesapeake & Ohio Coal and Coke Company, a corporation organized and existing under the laws of the State of West Virginia, which was, at the time of such commandeering, the exclusive selling agent of The New River Collieries Company, wherefore, a doubt has arisen as to whether the said The Chesapeake & Ohio Coal and Coke Company should not be, or may not properly be, a party plaintiff to the said proceeding or suit; and

"Whereas, a third amended petition is about to be filed in the said proceeding or suit in which The Chesapeake & Ohio Coal and Coke Company, the selling agent of The New River Collieries Company, to the use of The New River Collieries Company, is joined as a party plaintiff with The New River Collieries Company for a further assurance to the defendant, the United States of America, against any future claim by The Chesapeake & Ohio Coal and Coke Company growing out of the said commandeering orders;

"Now, therefore, know all men by these presents, that The Chesapeake & Ohio Coal and Coke Company does hereby admit and declare that it does not have and never had any right, title, claim or interest, in or to the bituminous coal, the property of The New River Collieries Company, which was commandeered by the Navy Department of the United States of America during the period from July 6th, 1917, to June 30th, 1919, pursuant to commandeering orders addressed to The Chesapeake & Ohio Coal and Coke Company or otherwise, and it does hereby confirm The New River Collieries Company's exclusive interest in and right to sue to recover just compensation for the said bituminous coal."

The court decided that plaintiff was not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This is a suit by the New River Collieries Company claiming a large sum for coal alleged to have been taken by the Government at or near Hampton Roads, besides a smaller quantity taken at the mines. Payments were made from time to time upon invoices rendered when the coal was delivered, and in the amounts shown by the invoices, but the claim is that these did not afford the just compensation to which the plaintiff was entitled.

The transactions out of which the suit grows had their origin in a letter by the Secretary of the Navy to the Chesapeake & Ohio Coal and Coke Company, dated June 14, 1917, followed by three orders signed by the Paymaster General of the Navy and known as Navy Order N–76, Supplementary Navy Order N–76, and Navy Order N–3005. The first of these orders, dated August 9, 1917, called for 14,000 tons of coal at a stated price "f. o. b. mines"; the second dated September 22, 1917, called for 50,000 tons f. o. b. mines and 31,000 tons at Newport News; and the third order, dated June 15, 1918, was for 200,000 tons of coal to be delivered at Hampton Roads by June 30, 1919. Each of them stated a price and also that it was issued pursuant to the provisions of the acts of March 4, 1917, 39 Stat. 1193, and June 15, 1917, 40 Stat. 182, and that compliance was obligatory. These orders were directed to the Chesapeake & Ohio Coal and Coke Company and all correspondence and other communications were had with that company. Invoices, at the stated prices or at prices prescribed from time to time by the Fuel Administrator, were rendered in its name and payments thereof were made to the same company. No order was issued to nor was any communication had with the New River Collieries Company. One of the questions in the case is whether, in these circumstances, the New River Collieries Company can maintain this suit.

The alleged dates of taking are between July 1, 1917, and June 30, 1919. The original petition was filed August 4, 1922. A fourth amended petition was filed December 21, 1926. In accordance with a rule of court in that regard, the petition mentions the statutes on which the cause of action is based, averring that the claim is founded upon the Fifth Amendment; upon the act of March 4, 1917, 39 Stat. 1193; upon the act of June 15, 1917, 40 Stat. 182; and that jurisdiction is conferred on this court by these acts to award a balance of just compensation. Where private property is taken for public use there can be no doubt that just compensation is due. "The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good condition pecuniarily as it would have occupied if its property had not been taken," per Mr. Justice Butler in *United*

States v. *New River Collieries Co.*, 262 U. S. 341, 343, citing *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299. See also *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123; *Liggett & Myers* v. *United States*, 274 U. S. 215. It is also laid down in the case first cited (262 U. S.) that where private property is taken for public use and there is a market price prevailing at the time and place of the taking that price is just compensation. The rules thus stated must be regarded as settled. But it is equally well settled that the taking must be authorized by Congress and that the officer assuming to act for the Government should have authority in that regard. *Hooe case*, 218 U. S. 322, 336; *North American Co.*, 253 U. S. 330, 333. Where the statutes relied upon prescribe the procedure there must be at least a substantial compliance with them. The process whereby the Government is held to have expropriated the citizen's property is designed to be an orderly one.

1. As to the power to take, it is said in the *Hooe case*, *supra* (p. 336), that the taking of private property by an officer of the United States for public use without being authorized, expressly or by necessary implication to do so, by some act of Congress, is not the act of the Government. And in the *North American Co. case*, *supra* (p. 333), it is said that although Congress may have conferred upon the executive department power to take property for a given purpose, the Government will not be deemed to have so appropriated private property "merely because some officer thereafter takes possession of it with a view to effectuating the general purpose of Congress." It was held in this case that authority conferred by the act on the Secretary of War could not be exercised by the commanding general of the department of Alaska, where the property was located, unless he was authorized by the Secretary of War.

The authority for placing the orders in the instant case is averred to be and must primarily be found in the acts of March 4, 1917, and June 15, 1917. The allegation that the claim is founded on the Fifth Amendment can only relate to the just compensation it requires because there was no authority acted upon or suggested as being in the President or anyone else to requisition coal, so far as concerns this suit,

except the two acts mentioned, or the admittedly extensive powers granted by the Lever Act of August 10, 1917. Except as granted by these acts there was a lack of authority to take. *Hooe case, supra; North American Co. case, supra.* The act of March 4, which expired by limitation on March 1, 1918, authorized the President to place an order with any person "for such ships and war material" as required "and which are of the nature, kind, and quantity usually produced or capable of being produced by such person." The act of June 15 extended this grant of authority because, while using in general the terms of the earlier act it authorized the President to place an order for ships "or material," adding also a definition of material that gives a broader meaning than "war material" could have. Compliance with such orders was declared to be obligatory. Armed with this authority the President could place obligatory orders with designated classes of persons. He was authorized to exercise these granted powers through such agency as he should determine and by Executive order set forth in the findings, and under date of August 21, 1917, the President directed that the Secretary of the Navy should have and exercise all power and authority vested in the President in the two acts "in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchasing, and requisitioning of materials for construction of vessels for the Navy and of war materials, equipment, and munitions required for the use of the Navy and the more economical and expeditious delivery thereof." The authority so delegated could be exercised by the Secretary directly or through officers "who, acting under his direction, have authority to make contracts on behalf of the Government."

It is quite plain that the President did not delegate or intend to delegate to the Secretary of the Navy or officers of the Navy all of the power and authority vested in him by these acts. The use in the order itself of the phrase "in so far as applicable to and in furtherance of" certain things suggests a limitation, and, as will appear, there was a reason

for it. The only words in the order that can embrace fuel or coal are "war material," and it is noticeable that the reference to war materials adopts the restricted phrase in the act of March 4 instead of the broadly defined "material" used in the act of June 15. If this order stood alone and there were no other legislation than the two acts, the construction of the order might be more liberal than the mere words admit of, because of the conditions giving rise to the power granted by the statutes. But after the act of June 15 another act was passed, that of August 10, 1917, known as the Lever Act, which very much increased the powers of the President under former acts. By section 10 he is authorized to requisition, among other things, "fuels and supplies" necessary for the Army and the maintenance of the Navy, and by other sections he may fix prices and take control of coal mines. On the very day, August 21, on which the Executive order delegated powers to the Secretary of the Navy, another Executive order was issued prescribing, provisionally, the prices of coal, and on August 23 yet another Executive order appointed the Fuel Administrator and conferred on him the powers given to the President by the Lever Act so far as the same applied to fuel, and also directed all departments of the Government to cooperate with the Fuel Administration. Two of the three orders in this case were issued from the Bureau of Supplies and Accounts after August 21, both of them making express reference to the Fuel Administration. It would seem reasonable, therefore, to hold that when the Executive order of August 21 was actually issued consideration had been given already to the order of August 23 that would delegate powers to the Fuel Administrator and that the one order was not intended to overlap or interfere with the powers of requisition conferred by the other under the Lever Act. The two earlier acts authorizing the placing of obligatory orders provided for their enforcement where necessary by taking charge of the factory or plant. The Lever Act authorizes taking over of plants and has especial reference to coal mines. Is it to be supposed that the Executive orders conferred on the Navy Department the power to take over a coal mine and thereby interfere with the broader powers conferred by the act of August 10 that were delegated

to the Fuel Administrator? This view harmonizes with the *New River Collieries Co. case, supra*, because the claim there was that coal was requisitioned at Hampton Roads for use of the Navy between the dates of September 17, 1919, and February 1, 1921, the opinion stating that the taking was under sec. 10 of the Lever Act. In the opinion of the Circuit Court of Appeals (276 Fed. 690) it is said that the Government "through the Navy Department requisitioned a large tonnage of coal belonging to the Collieries Company * * * and tendered payment at a price named by the Navy Department." The orders themselves do not appear otherwise than as stated. But referring to this case, the petition in the instant case avers that the facts "as to the method of commandeering were the same as in the case at bar," the commandeering orders having been directed to the Chesapeake & Ohio Coal and Coke Company, and the plaintiff's brief characterizes it as a suit "between the same parties and under like facts." Assuming the facts to be as thus stated, the case mentioned adds force to what we have said, because the opinion of the Supreme Court declares it to be a case under section 10 of the Lever Act, and it could not have escaped attention that of suits based on this section the district courts have exclusive jurisdiction. *Pfitsch case*, 256 U. S. 547. Manifestly, the same facts could not give rise to a requisition under a different statute without defeating the intention to confer exclusive jurisdiction under the section mentioned. If, on the other hand, the orders in the *New River Collieries Company case* purported to be under the Lever Act and similar to those found in the *White Oak Coal Co. case*, 15 Fed. (2d) 474, the change in the form of the order from the acts of March 4 and June 15 is significant as indicating a lack of authority under the latter to accomplish the desired requisition. This act of June 15, 1917, was substantially reenacted in 1918, 40 Stat. 720, and was in force during all the time in question, as was also the Executive order of August 21 delegating power to the Navy Department. If the coal could be requisitioned under this act, why turn to the other statute?

In two cases presenting claims for coal and based upon orders under the acts of March 4 and June 15 this court held

that a contract arose whereby the Government was bound to pay the market price of the coal delivered. *Consolidation Coal Co. case*, 60 C. Cls. 608; *Pocahontas Fuel Co. case*, 61 C. Cls. 231. Both of these cases were for large quantities of coal furnished the Navy during parts of the period here involved. In a later case, *Liggett & Myers*, 61 C. Cls. 693, that did not involve the authority to requisition fuel, this court held there was a contract. The case was tried upon a stipulation of facts that contained no reference to the powers delegated by the President under the acts of March 4 and June 15. No question was raised upon the authority of the Secretary, the case turning in this court upon the right to interest on an admitted balance. The Supreme Court reversed the judgment and held that the property had been taken by eminent domain, referring, among others, to the general defense act of 1916, which can have no possible application in the instant case, because the fact averred and found to be is that the authority in the Navy Department to place the requisition orders rests upon these acts and the Executive order of August 21. The decision in *Liggett & Myers* does not qualify the *New River Collieries Company case* or affect the ruling that that suit was properly brought under section 10 of the Lever Act.

2. But in addition to this question of authority is that of a want of substantial compliance with the procedure directed by these statutes. They provide for just compensation, to be determined by the President, and if the amount so determined be unsatisfactory the person entitled may accept seventy-five per cent thereof and sue for the additional sum that will make just compensation. The averments of the petition and the facts are to the effect that no such action has ever been taken. The orders mentioned a price that would be paid and further that if unsatisfactory the right under these statutes to take 75 per cent was open. The Chesapeake & Ohio Coal and Coke Company, to whom alone the orders were directed, repeatedly stated its purpose to reserve all rights under the statutes named in the orders. It rendered its invoices at the prices stated, or at such prices as were prescribed from time to time by the Fuel Administration. The allegation, accordingly, is that the payments of these

invoices were for the entire tonnage at the full prices mentioned, and this allegation is sustained by the proof. The Government paid the freight besides some other charges, which included war tax. These acts provide a method and procedure whereby the Government may be made to respond. It has been held that if the Government attaches purely formal conditions to its consent to be sued these conditions must be complied with and the words being in the statutes "they mark the conditions of the claimant's right." *Rock Island Railroad Co. case*, 254 U. S. 141, 143. In the *Seaboard Air Line Railway Co. case*, *supra*, and the case of *New River Collieries Company*, *supra*, it appeared that action had been taken. In the *Brooks-Scanlon Corporation case*, 265 U. S. 106, and a number of similar cases, and in *Liggett & Myers case*, *supra*, there was an ascertainment of compensation which the parties would not accept. The acceptance of 100 per cent of the prices fixed in the order does not deprive the court of jurisdiction of the case. *Houston Coal Co. case*, 262 U. S. 361. But such acceptance does concern the merits. *United States* v. *McNeil & Sons*, 267 U. S. 302; *White Oak Coal Co.* v. *United States*, 15 Fed. (2d) 474. The latter was a suit brought in the district court on account of a requisition order by the Navy Department for coal to be delivered under the Lever Act. The order contained the provision that if the price was not satisfactory 75 per cent of it could be accepted and suit brought for the additional sum that would afford just compensation. The plaintiff accepted the prices fixed by the order and afterwards brought suit. The court says (p. 477): "Under the law, as well as under the offer of the Government, plaintiff was entitled to the full amount of the price fixed, only in the event it was accepted in full satisfaction. It had the right to decline the Government's offer and sue for the value of the property taken, if it desired to do so, but in that event it was entitled, not to the full amount of the price fixed, but only 75 per cent thereof. It obtained the full price by accepting the offer, certifying the price fixed as satisfactory, and rendering invoices, not for 75 per cent, but for the full price, which it accepted without protest." In the instant case there was no acceptance of the Navy orders as satisfactory in the first instance, but the

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full price was ultimately paid upon invoices rendered and payments made without protest. As was further said in the case just cited: "It voluntarily elected to pursue one of two inconsistent remedies as a means of obtaining compensation for its property. Having obtained benefits thereby which it could not otherwise have obtained, it is estopped from pursuing the other remedy." Certiorari was denied in this case. (273 U. S. 756.) The instant case was begun by petition filed in August, 1922. This was subsequent to the decision of the Circuit Court of Appeals in *New River Collieries Co. case*, 276 Fed. 690, though the requisition of coal there involved was long after the alleged requisition in the instant case. The Chesapeake & Ohio Coal and Coke Co. had been paid the domestic market prices, and notwithstanding its early declaration that it would assert its rights under the two acts mentioned in the orders, it took all of its invoice prices and did not confine itself to the right afforded by these acts. Nearly five years after the first shipment and three years after the last the suit is brought by the New River Collieries Company to recover the export value of the coal. Relying upon the statutes there should be compliance with them. The objections made after the first order was issued sufficiently apprised the department of the unwillingness of the Chesapeake & Ohio Coal and Coke Company to accept the prices. But it could change its view on this subject, and we think it should be held to have done so, when it received full payment. Though these statutes were subsequently repealed, the powers granted by them to the President to determine compensation were conferred upon the United States Shipping Board Emergency Fleet Corporation by the act of June 5, 1920, 41 Stat. 989, thus indicating that Congress regarded such action as a prerequisite to recovery in court. And whatever may be said about the effect of the Executive order of August 21, 1917, it clearly did not delegate this duty of determining just compensation. The orders issuing from the Navy Department stated prices that varied from time to time in accordance with rulings of the Fuel Administration, but the Navy Department could not fix prices, and for the action of the Fuel Administration there is no remedy except in the District Court. *Pfitsch case, supra.* The prices the

latter prescribed were applicable generally to producers, distributors, and vendors of coal, and notwithstanding greater prices could possibly have been realized in open markets, no liability of the Government to the owners or vendors arose from the regulation of prices. *Pine Hill Coal Co. case*, 259 U. S. 191, 55 C. Cls. 433; *Morrisdale Coal Co. case*, 259 U. S. 188, 55 C. Cls. 310. For the reasons that the full prices have been accepted and that the statutory procedure is not observed, we think the plaintiff's suit should fail.

3. Another question urged by the defendant is that the New River Collieries Company can not maintain this suit. The acts provide for the placing of "an order with any person" for material of the nature, kind, and quantity usually produced or capable of being produced "by such person." A refusal to comply with the order arms the President or his agent with power to enforce it by taking possession of "any ship, charter, material, or plant of such person" and use the same, the act of March 4 employing the term "factory" where "plant" is used in the later act. There can be no doubt that the right of eminent domain may be exercised, when authorized, outside of these statutes, but when they are invoked and relied upon they designate the persons to be affected. As already stated, the orders were placed with the Chesapeake & Ohio Coal and Coke Company, a West Virginia corporation. Indeed, the first communication was sent to that company on June 14—prior to the enactment of the statute of June 15 and prior to any delegation by the President of authority—and it was not until afterwards assured that the order was obligatory under the two acts that it proceeded to comply with its terms. That company owned no coal mines and had no coal except such as it might acquire from others. It bought and sold coal and was the sales agent of the plaintiff and also of other coal-mining corporations. The facts show that all of the coal involved in this action was delivered by the Chesapeake & Ohio Coal and Coke Company. All of the correspondence relative to the coal or the orders was had between this company and the Navy Department. It arranged with the carrier for shipments and "it was understood by the Government and the Chesapeake & Ohio Coal and Coke Com-

pany that the company was to pay the freight and other charges for handling the coal * * * and the Government was to reimburse said company therefor." The prices stated in the orders, which were increased from time to time in accordance with those fixed by the Fuel Administration under the Lever Act, were paid to this company for the coal delivered. The plaintiff in this action is the New River Collieries Company, a New Jersey corporation, which owned and operated coal mines. It sold its coal through the Chesapeake & Ohio Coal and Coke Company, the stock of which company it owned. The officers of the two companies were substantially the same. The coal came from the mines of the plaintiff company. Its mines, among others, appeared on the "Navy Acceptable List" kept by the Navy Department. The coal destined for western points was shipped on Government bills of lading but that delivered at tidewater was shipped under arrangements made between the railroads and the Chesapeake & Ohio Coal and Coke Company, whereby the latter was billed from time to time for the coal delivered. There was nothing in the orders requiring that the coal be sent from the plaintiff's mines, and there were other mines from which it could have been shipped. The statutes authorize the placing of orders with the owner, but if not so placed they are not obligatory. If the Chesapeake & Ohio Coal and Coke Company had refused or failed to comply with the orders there was no coal or mine to be taken possession of, because it had neither. The orders placed with it were not roving commissions to be placed as it saw fit. The plaintiff company was not obliged to furnish any coal and its mines could not have been seized. It had none of the burdens and was not subject to any of the penalties prescribed by the acts. It is the right to enforce compliance that gives the orders their obligatory effect. The Chesapeake & Ohio Coal and Coke Company's invoices as rendered from time to time were headed Navy Department, "Bought of the Chesapeake & Ohio Coal and Coke Company (selling agents New River Collieries Company)," and this is the only reference to the latter in any communication. The terms under which the coal was delivered to this sales agent do not appear. The phrase

itself is indefinite. We had occasion to consider the activities of selling agents in *J. H. Lane & Co.*, 62 C. Cls. 721, 722, 731, where the selling agent guaranteed the payments. It is entirely consistent with what was done to say that the term sales agent is descriptive of the person. The New River Collieries Company furnished the coal, loading it on the cars, for the Chesapeake & Ohio Coal and Coke Company. It was not ordered by the Government to do this. Its action was voluntary. The prices prescribed were as much as it could have received from any purchaser at the mines. The principal objections interposed by the Chesapeake Company were made in 1917. In June of that year that company notified the Navy Department that it had "not agreed to supply coal at less than a very fair price of $2.95," and the prices in Navy order N–3005 were above this amount. But the New River Collieries Company made no objection at any time until this suit was brought in 1922. Until this event no communication passed between it and the Government. If in these circumstances it can recover as for a requisition of its coal, the language of the two acts relied upon becomes meaningless. It has had no orders placed with it, and was not required by the Government to furnish coal. It has not called upon any governmental agency to determine compensation. It has received the full price offered and has never uttered a protest or objection until, as stated, this suit was brought. Having taken this position and obtained benefits thereby, it can not have recourse to a statute with which it has never complied. *White Oak Coal Co., supra.* Parties when subjected to requisition or obligatory orders, can avail themselves of the benefits of the statute in the increase of the prices and allowance of interest on deferred payments, and so also may the Government avail itself of the fact that its orders were not directed to and were not obligatory upon such parties.

In an amended petition filed in 1924 the Chesapeake & Ohio Coal and Coke Company is added as a party suing for the use of the New River Collieries Company. This is done, plaintiff insists, out of abundance of caution and not because it is necessary. If it is a necessary party, a large part of

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the claim would be barred by the statute of limitations. The amendment does not aid the plaintiff.

In plaintiff's brief appear references to a stipulation entered into in 1924 between plaintiff's attorney and the then Assistant Attorney General assigned to this court. His successor refused to be bound by this stipulation, giving timely notice to the other side. Evidence was afterwards adduced on the disputed questions. This court more than forty years ago declared that while the Attorney General had authority by statute to conduct suits in this court, and could do every act which an attorney at law might lawfully do in a suit between individuals, he can not bind the Government by admitting facts adverse to it and not officially known to him to be true. See *Campbell's case*, 19 C. Cls. 426, 429. This rule has been somewhat relaxed, and cases are frequently tried upon stipulation duly signed, but the right to reject a stipulation has not been surrendered. This is not to say that the Attorney General may not consent to a judgment upon agreed facts. It is to say, however, that all below him may not be accorded the like authority. It may be seriously questioned whether the Assistant Attorney General had knowledge of the facts, but, at any rate, whether the facts or conclusions be in issue, the stipulation was made, "subject to the approval of this honorable court." And the court does not approve it. As already said, the plaintiff has had full opportunity to make all proof it desired.

Upon the whole case our conclusion is that the petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

B. F. HOFFMAN, INC., v. THE UNITED STATES

[No. E-463. Decided April 2, 1928]

On the Proofs

Excise tax; sec. 900, revenue acts of 1918 and 1921; automobile trucks; separate sales of chassis and body; assembly.—A dealer in automobiles and accessories, who sells truck chassis and bodies therefor separately, keeping the chassis in stock and ordering

the bodies as and when required, is not by reason of such sales a manufacturer or producer of automobile trucks, within the meaning of section 900, revenue acts of 1918 and 1921, imposing an excise tax, notwithstanding the chassis and body are assembled, before delivery, by the company manufacturing the body.

The Reporter's statement of the case:

Mr. Richard S. Doyle for the plaintiff. *Messrs. Charles D. Hamel, John Enrietto,* and *Louis J. Bergson,* and *Hopkins, Starr & Hopkins* were on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is and was at all times mentioned herein a corporation organized under the laws of the State of Pennsylvania, with its principal office and place of business at 321 Broad Street, Philadelphia, Pa.

II. From March 1, 1920, to April 1, 1923, plaintiff was engaged in the business of selling at retail automobiles and tractors manufactured by the Ford Motor Company and accessories therefor, including bodies for truck chassis. During this period plaintiff did not manufacture or assemble any trucks or automobiles at its place of business. It did not have any factory or facilities for manufacturing trucks or automobiles, and the only profit derived from the sale as a dealer in Ford automobiles, chassis, and accessories therefor was an amount equal to 20 per cent of the listed retail price, said 20 per cent being known as the "dealer's discount."

III. During the said period plaintiff sold to its customers certain Ford chassis, the exact number of which is unknown, and also sold to some of the same customers, for use on the said chassis, automobile and truck bodies manufactured by the Lyter Body Company, a corporation organized under the laws of Pennsylvania, with its principal office and place of business in Philadelphia, Pa.

IV. In the aforesaid transactions plaintiff made separate sales to the customer, first of the chassis, according to the class, weight, and type desired, and then of the body, the

type and class of which was selected by the customer from a catalogue of the said Lyter Body Company.

V. In the delivery of these articles the plaintiff, at the request of its customer, sent the chassis to the Lyter Body Company. The body company mounted the body on the chassis, making such changes in the body as the customer might direct personally or through plaintiff. In many cases the customer would personally interview a representative of the Lyter Body Company and give him specific instructions as to style, color of paint, and character of lettering, if any, and other details concerning construction of the body. No separate charge for such mounting was made by plaintiff or by the Lyter Body Company. Mounting consisted simply in setting the body on the chassis and fastening about eight bolts, consuming approximately an hour's time. The truck so assembled was then delivered by the body company to a representative of the plaintiff and by the plaintiff delivered to the customer.

VI. In all such transactions the plaintiff issued to its customers separate invoices, one covering the sale of the chassis and the other the sale of the body. The Ford Motor Company billed the chassis to the plaintiff as a dealer at the list price minus "dealer's discount" and added thereto the amount of the manufacturer's excise tax, commonly known as the "war tax," which tax was passed on by plaintiff in the exact amount in its bill to the customer. The Lyter Body Company billed the body to the plaintiff as dealer at list price minus "dealer's discount," and included in said list price (as noted on the bill) the amount of the manufacturer's excise tax, commonly called the "war tax," and plaintiff also passed that exact amount on to the customer in its bill.

VII. Believing that it was not a manufacturer within the meaning of the statutes imposing excise taxes on automobile trucks and accessories therefor, plaintiff did not file any returns for or collect from its customers any excise taxes on the aforesaid sales of chassis and bodies other than the amount of manufacturer's excise taxes so included in the bills from the Ford Motor Company and the Lyter Body Company, which excise taxes had been passed on to plaintiff by the said companies.

Reporter's Statement of the Case

VIII. On or about June 9, 1923, the Commissioner of Internal Revenue received from the collector of internal revenue for the first district of Pennsylvania a report made by Internal Revenue Agent Lewis Appel June 5, 1923, recommending the assessment against plaintiff of $4,961.36 as manufacturer's excise tax, penalties and interest on the aforesaid sales, during the period in question, as sales of automobile trucks by the manufacturer. This report was based on an examination of invoices of sales of bodies and chassis for the period January 1, 1922, to April 1, 1923. Most of the invoices and records of sales of bodies and chassis for the period March 1, 1920, to January 1, 1922, had been lost or destroyed. There is no evidence that any invoices or records were destroyed in order to avoid the imposition of taxes. The said revenue agent made his estimate of the proposed tax for the year 1921 by deducting 10 per cent from the tax he proposed for the corresponding months in 1922; and for the period March 1, 1920, to January 1, 1921, by deducting 10 per cent from the tax thus calculated for the corresponding months in 1921.

Plaintiff at no time agreed to or acquiesced in this method of determining tax liability.

IX. The Commissioner of Internal Revenue in June of 1923 assessed against the plaintiff manufacturer's excise tax in the sum of $3,220.86, together with a penalty of $966.28 and interest in the sum of $774.22, for the period March, 1920, to March, 1923, inclusive, a total of $4,961.36, as estimated by the internal revenue agent. Said total was paid by plaintiff September 10, 1923.

X. Claims for refund of the entire amount so assessed and paid were filed by the plaintiff May 20, 1924, with the proper collector of internal revenue, one for the sum of $3,607.97, being $3,220.86 tax plus $387.11 interest thereon, and the other for the balance of $1,353.39, representing $966.28 penalty and $387.11 interest. On the claim for $1,353.39 the Commissioner of Internal Revenue on or about March 31, 1925, remitted 25 per cent penalty, $805.24, and interest amounting to $144.66, a total of $949.90, on the ground that a reasonable cause for delinquency in filing returns had been established, and rejected the balance of the

said claims. The said sum of $949.90 has been repaid to the plaintiff, and the difference rejected, $4,011.46, remains in the Treasury of the United States.

The court decided that plaintiff was entitled to recover $4,011.46, with interest thereon from September 10, 1923, to date of judgment.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, B. F. Hoffman, Inc., during the period March 1, 1920, to April 1, 1923, was engaged in selling, at retail, automobiles and tractors, and accessories therefor, including bodies for automobiles and truck chassis. The bodies were manufactured by the Lyter Body Company, situated some ten blocks from plaintiff's place of business in Philadelphia. In brief, the customary method followed by plaintiff was to make a sale of a chassis according to the type desired by the purchaser. If the purchaser also desired a body a selection would be made from a catalogue of the Lyter Body Company and same would be attached to the chassis by that company at its own plant. Changes from the catalogue design would be made by the Lyter Body Company as requested by the purchaser, or by plaintiff for the purchaser. The Ford Motor Company billed the chassis to the plaintiff as a dealer at the list price less a 20 per cent discount, adding thereto the amount of the manufacturer's excise tax. The Lyter Body Company billed the body to the plaintiff as dealer at the list price, less a 20 per cent discount, including in the list price the amount of the manufacturer's excise tax. Plaintiff would issue to the purchaser two invoices, one covering the sale of the chassis and the other for the sale of the body, and the purchaser was also billed for the amount of the manufacturer's tax in each invoice.

In August, 1923, plaintiff received a notice and demand from the collector of internal revenue for the first collection district of Pennsylvania for the payment of the sum of $4,961.36, same being claimed as manufacturer's sales tax, penalties, and interest, under the provisions of section 900 of the revenue act of 1918, 40 Stat. 1122, and of section 900 of the act of 1921, 42 Stat. 291, almost identical in language

with the first-named statute. The pertinent portions read as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum:

* * * * *

"(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) and (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

The amount of said tax, penalties, and interest was paid by plaintiff under protest on September 4, 1923, and thereafter two claims for refund were filed with the Commissioner of Internal Revenue, one for $3,607.97, representing the amount of tax and interest, and the other for $1,353.39, representing the penalties and excess interest. The claim for the refund of $3,607.97 was rejected, and the claim for the refund of $1,353.39 was allowed in the sum of $949.90, and rejected in the sum of $403.49. This suit is for the recovery of the balance, claimed by plaintiff, amounting to $4,011.46.

The sole question for determination is whether or not plaintiff was, for the period involved, a manufacturer of automobile trucks in the meaning of the statute above quoted.

No charge of bad faith or of any purpose to evade taxation is made. Plaintiff, believing that it was not a manufacturer of automobile trucks, did not collect from its customers the manufacturer's sales tax, and, of course, did not include same in its tax returns.

Defendant relies upon the case of *Klepper* v. *Carter*, 286 Fed. 370. The facts in that case were substantially as follows: Klepper was a retail dealer in automobile trucks. At various times in the year 1919 he bought thirteen automobile trucks from the Bethlehem Motors Company. The trucks were equipped with cabs. Plaintiff purchased bodies as they were needed from the Weber automobile body works and

mounted the bodies on the chassis and sold the completed trucks at retail. The court said:

"In our opinion Klepper was properly held to be a manufacturer or producer of automobile trucks. While he did not make any of the several parts, nevertheless he bought the parts made by others, and he sold a completed automobile truck. * * *

"We are not going too far when we recognize that the commonly known method of transacting the automobile truck business was for a person to buy a chassis from one dealer or maker, and a body from another, and then to assemble the two. Klepper saved the purchaser all this trouble, and made it his business to retail the product of his purchases as an automobile truck. Thus he produced or manufactured the truck."

In the instant case a different method was pursued. Plaintiff purchased chassis from the Ford Company and carried same in stock, together with Ford bodies and accessories. Bodies were not carried in stock. A customer would select and purchase a chassis, which was separately billed to the customer. If a body was desired, the customer would be shown a catalogue of the Lyter Body Company and from that a body would be selected and an order would be issued by plaintiff to the Lyter Company for same. If special features were desired by the customer, they were entered on the purchase order to the Lyter Company. The body was billed to plaintiff, and by plaintiff was billed to the customer. No bills were ever rendered for a completed truck. The body was mounted on the chassis at the plant of the Lyter Body Company. This process involved about an hour's labor and the adjustment of eight bolts, and was done by the Lyter Company without charge and as an inducement to purchase its products. It was a very simple operation and could be performed by the purchaser himself. We are of the opinion that the facts do not bring this case within the rule announced in the *Klepper case*, *supra*. Plaintiff was not a manufacturer in the meaning of the statute on the subject and is entitled to recover, and it is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

J. R. POSTE v. THE UNITED STATES

[No. D-788. Decided April 2, 1928]

On the Proofs

Income tax; dividends; date of declaration; date of payment.—Under the income-tax laws dividends become income to the stockholders at date of their payment and not at the date of declaration.

The Reporter's statement of the case:

Mr. Spencer Gordon for the plaintiff. *Covington, Burling & Rublee* were on the brief.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Alexander H. McCormick* was on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff, J. R. Poste, is now and was during all of the times herein involved, a citizen of the United States, residing in the city of Columbus, in the State of Ohio.

II. The Columbus Bolt Works Company is now and was during all of the times mentioned in these findings a corporation organized and existing under and by virtue of the laws of the State of Ohio.

III. During the years 1916 and 1917 the issued and outstanding capital stock of the Columbus Bolt Works Company consisted of 1,500 shares of the par value of one hundred dollars each of the preferred stock entitled to a dividend at the rate of 7% per annum, payable semiannually, and 3,300 shares of common stock of the par value of one hundred dollars per share. The par value of the preferred and common stock of said company during said years was $480,000.

IV. On December 31, 1916, the undistributed surplus of the Columbus Bolt Works Company was $637,687.48. The fiscal year of said company corresponded with the calendar year ending on the 31st day of December of each year.

V. The net earnings of the Columbus Bolt Works Company available for dividends in the year 1917 were $383,986.59.

VI. At a meeting of the board of directors of said company held on the 15th day of January, 1917, a resolution was passed declaring a dividend of 3½ per cent on the outstanding preferred stock out of the surplus earnings and made payable not later than February 19, 1917, to the stockholders of record as of February 10, 1917.

J. R. Poste, plaintiff herein, at that time owned thirty-four shares of the preferred stock, and pursuant to said resolution there was paid to him by the Columbus Bolt Works Company the sum of $119.00.

At a meeting of the board of directors of the Columbus Bolt Works Company, held on the 20th day of February, 1917, a resolution was passed declaring a dividend of 90% on the outstanding common stock of the company, to be paid out of surplus earnings and made payable on February 27, 1917, to the stockholders of record as of February 24, 1917.

J. R. Poste, plaintiff herein, at that time owned 3,090 shares of the common stock of said company, and pursuant to said resolution there was paid to him the sum of $278,-100.00, being a dividend of 90% upon the 3,090 shares of the common stock of said company held and owned by plaintiff.

VII. On June 19, 1917, at a meeting of the board of directors of said company, a resolution was passed ordering that a dividend of 3½% be declared on the outstanding preferred capital stock payable on June 30, 1917, out of the surplus earnings, to the stockholders of record as of June 20, 1917.

Pursuant to said resolution there was paid to J. R. Poste the sum of $119.00, representing a dividend of 3½% upon the thirty-four shares of preferred stock of said company held and owned by plaintiff.

VIII. On the 18th day of December, 1917, a resolution was passed by the board of directors of said company declaring a dividend of 90% on the outstanding common stock of the company, to be paid out of the surplus and made payable on December 18, 1917, to the stockholders of record as of December 18, 1917.

Pursuant to said resolution there was paid to J. R. Poste, plaintiff herein, on December 18, 1917, the sum of $278,100.00, representing a dividend of 90% on the 3,090 shares of common stock held and owned by plaintiff.

On the same date, to wit, the 18th day of December, 1917, a resolution was passed ordering that a dividend of 3½% on the outstanding preferred capital stock of the company be declared out of the surplus of said company and made payable on December 18, 1917, to the stockholders of record, as of December 18, 1917.

Pursuant to said resolution there was paid by said company to J. R. Poste, plaintiff herein, on the 18th day of December, 1917, the sum of $5,250.00, being a dividend of 3½% on 1,500 shares of the preferred stock of said company held and owned by the plaintiff at said time.

On February 10, 1917, and on June 20, 1917, plaintiff, J. R. Poste, owned thirty-four shares of the preferred stock of the Columbus Bolt Works Company, and on December 18, 1917, plaintiff owned 1,500 shares of the preferred stock of said company. During the year 1917 plaintiff owned 3,090 shares of the common stock of said company.

IX. Plaintiff caused to be prepared and filed with the collector of internal revenue a tax return for the year 1917, and in this return he allocated the entire amount of the dividends received by him during 1917 from the Columbus Bolt Works Company as though declared on earnings of said company of the year 1916. Plaintiff paid income taxes to the United States on that basis in the sum of $52,901.98. This return was audited by the collector of internal revenue, and as a result of such audit an additional tax due for the year 1917 in the sum of $95,504.60 was assessed. The Bureau of Internal Revenue acted on the theory that the dividends received by the plaintiff from the Columbus Bolt Works Company during the year 1917 was attributable to 1917 earnings of that company to the extent that there were net earnings by the company up to the dates of payment of such dividends, and determined the amount of net earnings of the company to the dates in question by taking the total net income of the company for the year available for dividends and prorating it to the date of payment. On this basis

the bureau allocated the dividends in question to earnings of the year 1917, except the dividend on the common stock declared February 20, 1917, and paid February 27, 1917, from which the plaintiff received $278,100.00 as set out in Finding VI herein. The bureau found that the company's net earnings from January 1, 1917, to February 26, 1917, available for dividends, were $56,461.94, and that to the extent of said amount the total dividend paid by the company February 27, 1917, should be considered as declared out of 1917 earnings. Said sum of $56,461.94 was 19% of the total dividend paid by the company February 27, 1917; 19% of the $278,100.00 received by the plaintiff from said dividend was $52,839.00, and to the extent of said sum the dividend paid to the plaintiff February 27, 1917, was considered by the bureau as declared out of 1917 earnings and the remainder of said dividend was considered as declared out of 1916 earnings.

X. On October 13, 1919, plaintiff paid the additional tax for the year 1917 in the sum of $95,504.60. No protest of any kind was made by plaintiff at the time he made the payment of said tax, but said payment was made to avoid the imposition of penalties and the seizure and sale of property belonging to plaintiff.

Immediately thereafter plaintiff filed with the collector of internal revenue a claim for refund of said $95,504.60, claiming that the dividends had been erroneously allocated, which claim for refund was denied by the commissioner by letter dated July 23, 1921, as follows:

WASHINGTON, D. C., *July 23, 1921.*

Mr. J. R. POSTE,
286 East 14th Street, Columbus, Ohio.

SIR: Your claim for the refunding of $95,504.60, individual income tax for 1917, has been examined.

The claim is based on the statement that the assessment of this amount was the result of erroneous allocation of dividends by the examining officer in an investigation of your income-tax liability for 1917, as shown in the report of the internal revenue agent in charge at Cincinnati, Ohio, dated May 15, 1919.

After careful consideration of the information submitted in the above report it appears that the allocations recom-

mended by the examining officer are in accordance with the provisions of article 107, Regulations 33.

The additional information embodied in your claim is not deemed sufficient to justify a change in the allocation of dividends recommended in the report of the examining officer.

Therefore your claim is rejected.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

XI. The prorated net earnings of the Columbus Bolt Works Company from January 1, 1917, to February 19, 1917, and available for dividends February 20, 1917, were $47,351.00. This amount represents 15.94% of the total dividend declared by the company February 20, 1917, and paid February 27, 1917. If that dividend was paid out of the 1917 earnings only to the date of its declaration, February 20, 1917, the amount of the dividend received by the plaintiff paid out of the 1917 earnings was 15.94% of the total dividend of $278,100.00 received by the plaintiff or $44,329.14. On this basis the total tax due from plaintiff for the year 1917 would be $145,257.93.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The facts in this case are not disputed. The report of the commissioner was accepted by both parties.

The original brief of defendant was filed upon an erroneous construction of the statute involved. In its supplemental brief it changed its position, due to the decision in *Mason* v. *Routzahn*, decided by the Supreme Court on November 21, 1927, 275 U. S. 175, and the *Bemis cases*, 64 C. Cls. 457, 467, decided on January 16, 1928. Under these decisions the tax paid by the plaintiff in accordance with the assessment by the Commissioner of Internal Revenue was the tax due, and therefore plaintiff was not entitled to a refund on the ground of an erroneous assessment; and there seems to be no dispute about this feature of the case. The one question is whether the tax should be paid on the dividend earned during the period from January 1, 1917, to the date of decla-

ration of the dividend or the date of payment thereof, the plaintiff contending that it should be paid as of the date of declaration. It is unnecessary to enter into a discussion of this question, which has been several times decided by the courts. The date of payment is the controlling date, it being the time at which the dividend was received. See *Edwards* v. *Douglas*, 269 U. S. 204; *Mason* v. *Routzahn*, *supra; Dodge and Bloomer* v. *United States*, 64 C. Cls. 178; and *Bemis cases*, *supra*. The petition should be dismissed, and it is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

JOHN W. LECRONE, RECEIVER OF THE ORINOCO COMPANY, LIMITED, v. THE UNITED STATES

[No. H-182. Decided April 2, 1928]

On Defendant's Plea of Res Adjudicata

Act of February 27, 1896; protocol between Venezuela and United States; release of concession; former adjudication.—The allegations of the petition and the special plea of defendant reviewed, and it appearing therefrom that the sum sued for was disbursed by the Secretary of the Treasury in accord with the opinions of the Court of Appeals of the District of Columbia and the Supreme Court of the United States, cited, which determined the merits of the controversy, the petition was dismissed.

The Reporter's statement of the case:

Mr. George N. Baxter for the plaintiff.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff, as receiver for the Orinoco Company, Limited, alleges in its petition, "That on the 22d day of September, 1883, the United States of Venezuela granted and conceded to one Fitzgerald for the period of ninety-nine

years, beginning on that day, the exclusive right to colonize and develop the resources of the territories therein described. That said Fitzgerald, in 1884, assigned the same to the Manoa Company, Limited, a New York corporation, which corporation in 1895 assigned the same to the Orinoco Company, a Wisconsin corporation, which in 1896 assigned the same to the said Orinoco Company, Limited, a Wisconsin corporation, which corporation in 1901 assigned the same to the Orinoco Corporation, a corporation organized under the laws of West Virginia." These corporations becoming involved with the Government of Venezuela in 1906 requested the State Department to intervene diplomatically and obtain redress for injuries inflicted upon the plaintiff. The State Department did intervene, and as a result of negotiation a protocol, dated September 9, 1909, was signed between the two countries whereby in consideration of the complete release of the concession the Venezuelan Government agreed to, and did pay, to the United States the sum of $385,000.

The petition further alleges that the above award was in accord with the act of February 27, 1896, c. 34, 29 Stat. 32, duly deposited by the Secretary of State with the Secretary of the Treasury, accompanied with the proper certificates disclosing a determination by the Secretary of State that $75,000, less $1,300.30 deducted as expenses, of the amount deposited be paid to the plaintiff company; that plaintiff company has received upon the proper presentation of a certificate a payment of $17,449.70, but has not received a balance of $56,250 which it is entitled to receive under the above facts.

The petition concludes with an allegation that the $56,250 represented by outstanding certificates remained in the United States Treasury until the 27th day of December, 1924, when the sum involved was upon wrongful representation paid to one James M. Proctor, acting as receiver for the Orinoco Iron Company. Judgment is asked for the alleged balance due the plaintiff.

The controversy between the plaintiff company and the Orinoco Iron Company with respect to the amount here involved has been before the courts on more than one oc-

casion. The plaintiff concedes that the above litigation determined the merits of the controversy. The single assertion made as to the right to proceed in this court irrespective of this admitted fact is that the courts in deciding the cases to be mentioned were without jurisdiction so to do. The petition discloses that the balance in the Treasury is the sum involved. The special plea of the defendant, the facts averred therein being admitted by the plaintiff, discloses that the Secretary of the Treasury disbursed the same in accord with the following opinions of the Court of Appeals of the District of Columbia and the Supreme Court of the United States. See *Orinoco Co., Ltd.* v. *Orinoco Iron Company*, 296 Fed. 965, affirmed by the Supreme Court, 265 U. S. 598. See also *Mellon, Secretary of the Treasury of the United States, et al.*, v. *Orinoco Iron Co.*, 266 U. S. 121.

The petition will be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER CO. OF BALTIMORE v. THE UNITED STATES

[No. D-723. Decided April 2, 1928]

On the Proofs

Income tax; return of corporation; deductions; subscriptions to war funds; "ordinary and necessary expenses."—Payment by a corporation of its subscriptions to war funds of the Red Cross, the Y. M. C. A., and similar agencies, was not an ordinary or necessary expense in the carrying on of business, which it was entitled to deduct in computing net income, as provided by the revenue acts of 1916 and 1918.

The Reporter's statement of the case:

Mr. Charles Markell for the plaintiff. *Haman, Cook, Chesnut & Markell* were on the briefs.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Alexander H. McCormick* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and existing under the laws of the State of Maryland and has its principal place of business at the city of Baltimore in said State. It is and was, during the period involved, engaged in the business of manufacturing and selling gas and generating and selling electricity. It has no competition in the supply of its particular service of gas and electricity. The volume of its business is largely dependent on the good will of the community. It gets a great deal of business through advertising and through various means of creating and maintaining the respect and good will of the people.

II. During the years 1917 and 1918, but after April 6, 1917, the plaintiff made payments in the following amounts, which accrued within the following periods, respectively:

July 1, 1916, to June 30, 1917:	
Baltimore fund	$2, 750. 00
July 1, 1917, to June 30, 1918:	
Red Cross	100, 000. 00
Y. M. C. A.	10, 000. 00
Baltimore fund	2, 750. 00
	112, 750. 00
July 1, 1918, to December 31, 1918:	
Red Cross	25, 000. 00
War-work campaign	4, 166. 67
	29, 166. 67

Prior to June 30, 1918, the plaintiff kept its accounts and made income-tax returns on a fiscal-year basis, its fiscal year ending on the 30th day of June. Since June 30, 1918, the plaintiff has kept its accounts and made income-tax returns on a calendar-year basis. Income-tax returns were made for the half year beginning July 1, 1918, and ending December 31, 1918. Throughout the years 1917 and 1918, as well as before and since, the plaintiff has kept its accounts and made its income-tax returns on an accrual basis.

III. (*a*) The above-mentioned "Red Cross" is the American National Red Cross incorporated by the Congress of the United States. The above-mentioned sums of $100,000 and $25,000 paid to the Red Cross were paid into the Red Cross war fund and the second Red Cross war fund, respectively.

President Wilson, who was also president of the Red Cross, on May 10, 1917, created the Red Cross War Council consisting of seven members, as a board of managing directors for the war period. To this war council was delegated by the executive committee full and complete control, management, and administration of all affairs connected with or incidental to operations arising out of the war. The President also created a war finance committee, the purpose of which was to direct the raising of $100,000,000 Red Cross war fund. The terms of subscription to this fund provided generally that the local chapters might receive of the funds raised in the various communities an amount not exceeding 25 per cent of the subscriptions of each community for local war-relief purposes and the remainder should be collected through the war finance committee and turned over to the treasurer of the American Red Cross. Appropriations for the first and second Red Cross war-fund campaign were made only for war-relief work, including foreign war-relief work and war-relief work in the United States.

(*b*) The above-mentioned sum of $10,000 paid to the Y. M. C. A. was paid into the 1917 fund raised by the national war work council of the Young Men's Christian Associations of the United States to provide for the war work of the council among the enlisted men of the United States Army and Navy at home and abroad, and also to provide a similar work in the armies of France, Russia, Italy, and other allies, and also for the prisoners-of-war work for a period of nine months ending June 30, 1918.

In General Orders No. 313, issued by the Navy Department at Washington under date of July 26, 1917, "cordial recognition is hereby given the Young Men's Christian Association as a valuable adjunct and asset to the service." In a letter dated April 28, 1917, Secretary Baker said that the young men then engaged in the work of the Young Men's Christian Association on behalf of the Army and Navy of the United States, and also in the work of the association on behalf of the men of the armies of the allied countries and in prisoners-of-war camps of the various belligerents undoubtedly were doing a service of high order for their country and their country's cause, and that pending their actual

call to the colors the War Department would recognize their service as directly in aid of the men in our own Army.

(*c*) The above-mentioned sum of $4,166.67 paid to the war-work campaign was paid into the 1918 fund for war purposes, raised by the united war-work campaign conducted jointly, at the request of President Wilson, by the united action of seven organizations, viz, National War Work Council of the Young Men's Christian Association, War Work Council of the National Board of the Young Women's Christian Association, National Catholic War Council (Knights of Columbus), Jewish Welfare Board, War Camp Community Service, American Library Association, and the Salvation Army.

Expenditures of this fund were strictly limited to war purposes. The united war-work campaign was conducted pursuant to a letter from President Wilson dated September 3, 1918, in which he requested that these seven organizations combine their approaching appeals for funds in a single campaign, so that in their solicitation of funds, as well as in their work in the field, they might act in as complete cooperation as possible. In the course of this letter President Wilson said:

"The War Department has recognized the Young Men's Christian Association, the Young Women's Christian Association, the National Catholic War Council (Knights of Columbus), the Jewish Welfare Board, the War Camp Community Service, the American Library Association, and the Salvation Army as accepted instrumentalities through which the men in the ranks are to be assisted in many essential matters of recreation and morale."

(*d*) The two above-mentioned sums of $2,750 paid to the Baltimore fund were paid into that part of the Baltimore fund designated as the "patriotic fund," to be administered through the Red Cross for the support of the families of men in the military and naval service. The Baltimore fund was raised in Baltimore, Maryland, for the express purpose, among others, of abridging the period before the Government made provision for the support of the families of men in its military and naval service.

IV. The above-mentioned payments were duly authorized by the proper official agencies of the plaintiff corporation.

The books of the plaintiff reflected these sums, not as of the time when the plaintiff subscribed thereto, but as of the date when the vouchers for the payment of the same were executed. Checks authorized in accordance with the vouchers issued within two or three days after the date of the voucher.

At the several times when the above-mentioned sums were respectively subscribed and paid by the plaintiff corporations generally in Baltimore made substantial payments for the same or similar purposes; all the corporations of any size in Baltimore, including plaintiff, were urged to contribute, and most of them did.

These subscriptions and payments by the plaintiff and other corporations were given wide publicity in Baltimore at the time they were made, and the plaintiff's subscription to the first Red Cross war fund was given publicity in New York.

V. For (1) the fiscal year ended June 30, 1917, (2) the fiscal year ended June 30, 1918, and (3) the half year ended December 31, 1918, the plaintiff made its returns showing net income after deductions, among others, of the payments above stated, as ordinary and necessary business expenses on which income and profits taxes were paid aggregating for the fiscal year ended June 30, 1917, $85,329.36; for the fiscal year ended June 30, 1918, $106,013.80; and for the half year ended December 31, 1918, $126,415.81. Subsequently, on June 14, 1920, after an examination of the original returns of the plaintiff and its affiliated corporations, the Commissioner of Internal Revenue ruled that the amounts of the contributions were not deductible as ordinary and necessary business expenses, and the plaintiff made amended returns, in which, under protest at the requirement of the commissioner, the above-mentioned contributions were eliminated as deductions from gross income.

The ultimate additional tax paid as a result of the nonallowance of the deductions as aforesaid was paid under protest on November 26, 1926, for the following taxable periods and in the following amounts:

Year ended June 30, 1917	$374.00
Year ended June 30, 1918	27,777.66
Year ended December 31, 1918	3,500.00
	31,651.66

VI. On December 12, 1921, the plaintiff filed with the collector of internal revenue a claim for refund of $38,832.36, the amount of income and profits taxes exacted from and paid by the plaintiff for the fiscal years ended June 30, 1917, and June 30, 1918, and the half year ended December 31, 1918, as the result of not deducting the payments aforesaid, aggregating $144,666.67 (and other payments not now insisted upon as a deduction). Said claim for refund was by the Commissioner of Internal Revenue disallowed and rejected on September 7, 1922, for the reason that the contributions were not deductible as ordinary and necessary business expenses.

The court decided that plaintiff was not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The question for decision is whether subscriptions made by a Maryland corporation to war funds of the Red Cross, the Y. M. C. A., and similar agencies, and paid during the year 1917, after the beginning of the war, and also paid in 1918, constitute "ordinary and necessary expenses paid within the year in the maintenance and operation of its business" (act of 1916), or "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" (act of 1918), within the intent and meaning of the quoted words in the revenue act of 1916 (39 Stat. 759, 767), and the revenue act of 1918 (40 Stat. 330). In other words, are payments so made proper deductions from the corporation's gross income in ascertaining its taxable net income? The claim asserted is that the corporation having been a large contributor to the Red Cross and other such organizations should have been allowed to deduct the amounts of these contributions from its gross income. The Commissioner of Internal Revenue having refused to allow the deduction, the plaintiff paid its taxes and sues to recover the amounts alleged to have been overpaid.

Opinion of the Court

Finding the words we are called upon to construe in a taxing act, we must recognize that the "literal meaning" of the words employed is most important because such statutes are not to be extended by implication beyond the clear import of the language used. Doubts are to be resolved in favor of the taxpayer. See *Gould* v. *Gould*, 245 U. S. 151, 153; *United States* v. *Merriam*, 263 U. S. 179, 188. In the latter case is cited with approval the rule stated by Lord Cairns in *Partington* v. *Attorney General*, L. R. 4 H. L. 100, 122, in the course of which it is said:

"In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

It is quite clear that the words of the act of 1916, "ordinary and necessary expenses," could not have been intended when the act was first enacted to be given the wide meaning now urged. As then used, they related to expenses paid in the maintenance and operation of the business, and were in the main the ordinary expenses incident to the particular trade or business. The extraordinary situation that developed later was not in mind when this taxing act was passed. When the act of 1916 was amended, 40 Stat. 330, a deduction was allowed in favor of individual taxpayers to the extent of 15 per cent of the taxpayer's taxable net income for contributions actually made to corporations or associations organized exclusively for religious and other designated purposes. But these deductions, in case of individuals, were allowable only if verified under rules and regulations to be prescribed by the commissioner with the approval of the Secretary of the Treasury. The act is silent as to such deductions by corporations. This provision for individuals on account of contributions is carried forward into the revenue act of 1918, but no such provision is made for corporations, though the allowable deductions in case of corporations are stated at length. (40 Stat. 1077.) But the deductions of "ordinary and necessary expenses" are applicable to both individuals and corporations, and if the deduction now urged is allowable it is singular that a deduction of charitable gifts

is allowable to individuals and is not even mentioned in case of corporations. In an opinion of the Attorney General given to the Secretary of the Treasury upon the question before us, that official held the deduction here sought was not to be allowed, giving, among others, the reason that an amendment, offered when the bill was under consideration, which would have made applicable to corporations the deduction for contributions to religious and other purposes, was defeated. While the act mentions ordinary and necessary expenses, it may perhaps be said that the expenses contemplated need not be both ordinary and necessary, but the expense must be an ordinary or a necessary one, and in any event the words should be given their usual meaning. It is argued for plaintiff that payments to the Red Cross or other war agencies are deductible "not as charitable contributions but as business expenses for the protection of its property." But it was not an ordinary expense, nor was it a necessary one. The amount was what the corporation thought proper to subscribe, and whether to be subscribed at all was a voluntary act.

The argument based upon the idea that the corporation was expected to help in the emergency gives no new meaning to the words of the statute. What should be deductible expenses, in arriving at the net income, is primarily a legislative question. Whether Congress would feel free to sanction contributions by officers of a corporation or whether in any case action by the governing board or the stockholders would be necessary are not questions for our determination. It is sufficient for this case to say that Congress has authorized certain deductions, and the court can not extend the terms they have employed. In our opinion, the items claimed were not deductible. The petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

CHARLES L. HUISKING v. THE UNITED STATES

[No. E-471. Decided April 2, 1928]

On the Proofs

Income and excess-profits taxes; secs. 201 and 209, revenue act of 1917; separation of brokerage and merchandizing businesses.—Where the business of a taxpayer was primarily that of a broker, requiring no capital or only a nominal capital, and due to the war he found it advantageous to and did engage in the additional business of buying and selling commodities, in which he employed an invested capital, but kept the two branches of his business separate, he was entitled to return his income and excess profits for tax purposes in accordance with the separation of his activities, and to an assessment, under sections 201 and 209 of the revenue act of 1917, on that basis.

The Reporter's statement of the case:

Mr. Levi Cooke for the plaintiff. *Cooke & Beneman* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Thaddeus G. Benton* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff at all times material herein was and now is a citizen of the United States and a citizen and resident of the State of New York.

II. This action is based upon a claim for the refund of $17,770.88 additional income and excess-profits taxes for 1917, alleged to have been erroneously collected from the plaintiff by the collector of internal revenue for the second district of New York.

III. On March 25, 1918, plaintiff made and filed with said collector of internal revenue on the form provided by said collector his Federal income and excess-profits tax return for the calendar year 1917, and in accordance with the computation made on that return plaintiff on or about June 4, 1918, paid to said collector income and excess-profits taxes for the said year in the sum of $72,531.50.

IV. Within the time prescribed by law the Commissioner of Internal Revenue assessed against the plaintiff additional income and profits taxes for the taxable year 1917 in the amount of $17,770.88, which amount upon notice and demand was paid by the plaintiff to said collector of internal revenue on or about June 14, 1924, under protest.

V. On July 15, 1924, plaintiff made and filed with the said collector of internal revenue a claim for refund of the said $17,770.88 so paid as additional income and excess-profits taxes for the year 1917. Thereafter, on December 15, 1924, said claim for refund was rejected by the Commissioner of Internal Revenue.

VI. The computation upon which the Commissioner of Internal Revenue determined the plaintiff's tax liability for 1917 to be $17,770.88 in excess of the amount of the tax liability as computed by the plaintiff is set forth in Exhibit D, as amended by Exhibit E, attached to plaintiff's petition and made a part hereof by reference.

VII. Exhibits A, B, C, D, and E attached to plaintiff's petition are genuine copies of the originals.

VIII. Plaintiff began the business of a drug broker in the year 1910 and continued solely as such until within a short time he was one of the larger brokers in the drug business. Upon the outbreak of hostilities in 1914 it became difficult to secure drugs immediately upon order therefor, or in sufficient quantities to satisfy the trade, and plaintiff found it advantageous to buy drugs on his own account whenever and wherever he could, later selling them to his customers. During all the time that he so engaged in trading he kept his books of account, showing separately his brokerage and his trading business. During the year 1917 plaintiff had by far the largest brokerage business in drugs in the United States, was the foremost commercial authority in the United States on drugs and allied products, and was so considered by the trade.

From January 1 to October 31, 1917, plaintiff was so engaged in business as a drug broker and in the business of buying and selling drugs on his own account.

IX. Plaintiff's income from carrying on business as a broker during the said period in 1917 was $69,511.74, all de-

rived from commissions in which the plaintiff operated as agent for and received his commission from the seller and employed in the earning of the said income no capital or only a nominal capital.

X. During the said period in 1917 the plaintiff earned net income from buying and selling drugs and other products on his own account the sum of $128,689.80, employing in the said business an invested capital of $310,852.99.

XI. Plaintiff in his excess-profits tax return for the year 1917 returned as taxable at the graduated rates under section 201 of the revenue act of 1917 the total sum of $90,478.93 made up of $128,015.03, less $50,000 as hereinafter set forth, reported net profit from carrying on the trade of buying and selling drugs, and a further sum of $12,463.90. In returning the said income plaintiff deducted $50,000 as personal compensation in connection with the said business of buying and selling drugs, representing his personal services and personal contribution to the earning of said income, and erroneously omitted from income an amount of $674.77. Plaintiff also reported in his income-tax return as taxable at 8 per cent under the provisions of section 209 of the said revenue act of 1917 the said amount of $50,000, and the further sum of $69,511.74 above stated as earned from carrying on the business of a broker in drugs and allied products.

XII. The commissioner determined plaintiff's income subject to the graduated rates under the provisions of section 201 of the revenue act of 1917 to be $140,665.44. He arrived at this determination by adding to plaintiff's income as reported for taxation at the said graduated rates in the amount of $90,478.93 the amount of $674.77, erroneously omitted as above set forth, and the amount of $69,511.74 earned by plaintiff as commissions and reported by him as taxable at 8 per cent under section 209 of the revenue act of 1917, and deducting from the total so determined of $160,665.44 a further amount of $20,000.00 as representing plaintiff's personal contribution to the earning of the said income.

XIII. During the period in 1917, as above set forth, in which plaintiff operated his individual business of buying and selling drugs and allied products, his value to the said business through his individual earning capacity was not

less than $70,000, exclusive of his earnings as a broker on commissions.

The court decided that plaintiff was entitled to recover $17,770.88, with interest from June 14, 1924, to date of judgment.

MOSS, *Judge*, delivered the opinion of the court:

Since 1910 plaintiff, Charles L. Huisking, has been continuously engaged in business as a drug broker. For a number of years prior to 1917, in addition to the brokerage business, plaintiff from time to time made incidental purchases and sales of drugs, chemicals, and allied articles as a merchant. After the beginning of the World War, plaintiff, realizing that the sources of available supply were insufficient to meet the world demand, began to give particular attention to methods of acquiring such articles as a merchant, by purchasing same outright. This branch of plaintiff's business grew rapidly during the war period, reaching its peak in 1917 when his net income from this source for the first ten months of that year amounted to $128,689.80, with an invested capital for the same period of approximately $300,000. During the same period plaintiff's net income from the brokerage business amounted to $69,511.74, with no invested capital except the necessary expense of maintaining an office with a force ranging from five to twenty employees. On November 1, 1917, plaintiff incorporated under the name "Charles L. Huisking, Inc.," and thereafter continued both the brokerage business and the merchandizing business.

In his income and excess-profits tax return for the period from January 1, 1917, to October 31, 1917, plaintiff stated a taxable income derived from his commissions as a broker amounting to $69,511.74, and also a taxable income derived from the business of buying and selling drugs on his own account in the sum of $128,689.80.

The question here involved is controlled primarily by sections 201 and 209 of the revenue act of 1917, 40 Stat. 303–307.

The applicable portion of section 201 provides:

"That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corpo-

ration, partnership, or individual a tax (hereinafter in this title referred to as the tax) equal to the following percentages of net income."

Here follows the schedule of percentages. Section 209 provides:

"That in the case of a trade or business having no invested capital or not more than a nominal capital there shall be levied, assessed, collected, and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section two hundred and one, a tax equivalent to eight per centum of the net income of such trade or business in excess of the following deductions: In the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000; in the case of all other trades or business, no deduction."

Article 39 of Regulations 41, promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, so far as applicable to this proceeding, reads as follows:

"An individual carrying on a trade or business having an invested capital may, in computing the net income of the trade or business, for purposes of the excess-profits tax, deduct a reasonable amount designated by him as salary or compensation for personal service actually rendered by him in the conduct of such trade or business. In no case shall the amount so designated be in excess of the salaries or compensation customarily paid for similar service under like responsibilities by corporations or partnerships engaged in like or similar trades or business."

In his return for 1917 plaintiff computed his excess-profits tax on the taxable income derived from the business of buying and selling drugs, by applying the graduated rates under section 201 above quoted according to the following process: He deducted from the net income of $128,689.80 the sum of $50,000, which he claimed as compensation for his personal services in connection therewith, and arrived at the tax due by applying to the remainder, $90,478.93, the appropriate percentage under section 201. He also reported in his return for excess-profits tax purposes as income taxable at 8 per cent under the provisions of section 209 of said act the sum of $69,511.74 derived from the brokerage business, to-

gether with the $50,000 which had been deducted from the $128,689.80 earned from the merchandizing business. There was a further sum, not important in the consideration of this case, which was returned by plaintiff. Plaintiff's total tax as thus computed amounted to $72,531.50, which was duly paid. Thereafter the Commissioner of Internal Revenue assessed against plaintiff for the same period an additional tax of $17,770.88, which was paid under protest. Plaintiff filed a claim for the refund of said sum and same was rejected. This suit is for the recovery of said additional tax.

The Commissioner of Internal Revenue determined plaintiff's tax liability by adding to the $90,478.73, which was the income from the merchandizing business, less $50,000 deducted by plaintiff as compensation for personal services, the amount of $69,511.74 earned by plaintiff as brokerage commissions. To this was added the sum of $674.77, being an item erroneously omitted by plaintiff in his original return, making a total of $160,665.44. In addition to the $50,000 claimed and deducted by plaintiff in his tax return as compensation for personal services in connection with the merchandizing business, the commissioner allowed the further sum of $20,000. The total of these two sums, $70,000, was then deducted from the total income, and the amount of tax due was determined by applying to the remainder the appropriate graduated rate under section 201. By this process it will be seen that plaintiff's income from the brokerage business, taxable at a flat rate of 8 per cent, is subjected to taxation measured by capital employed, not in the brokerage business, but in the collateral business of buying and selling. It results in this case in imposing an excess-profits tax of 60 per cent upon the greater portion of plaintiff's income as a broker, whereas the statute provides that such income should be taxed at 8 per cent.

The tax imposed by section 201 was a tax on capital. The rates were graduated to meet the varying conditions as to amount of invested capital, ranging from 20 per cent to 60 per cent of the amount of the net income. The tax imposed by section 209 was a tax on income produced solely, or almost solely, from personal services, and an arbitrary rate was fixed

as representing what Congress regarded as a fair measure for computing such tax. If the method adopted by the commissioner in the present case is sound in principle, the inevitable result would be the occasional imposition of the higher rates under the graduated scale of percentages on both classes of income, regardless of their relative importance. For example, a taxpayer in plaintiff's situation might produce an income, negligible in amount, from the business of a merchant and an abnormally large income from the brokerage business, and yet he would be required to pay the tax on the aggregate income from both sources at the disproportionately high rates. While plaintiff's income for 1917 derived from the trading business exceeded the income from the brokerage business, it was the result of accidental business conditions due to the exigencies of the war. Plaintiff's chief business throughout his entire career was that of broker. His activities in buying and selling, at first incidental and unimportant in volume, were a later development, which grew in importance after the outbreak of the World War, reaching its high point in 1917, and thereafter declined. The wide variance between the two classes of tax, one of which imposed a tax of 8 per cent and the other, as in this case, of 60 per cent, would seem to refute the idea that Congress could have intended that the latter percentages should, under any circumstances, be applied in determining the amount of tax in the former class, provided, of course, the two incomes were susceptible of definite separation. In this case that question presents no difficulties. The brokerage business and the merchandizing business were maintained separately on plaintiff's books, which clearly differentiated the two incomes.

The Government's theory does not seem to be in accord with the spirit and purpose of Congress as expressed in the statutes under consideration.

Defendant cited the case of *J. H. Lane & Company* v. *United States*, 62 C. Cls. 721, as decisive of this case. The statute applicable to the question involved in the *Lane case* was section 303 of the revenue act of 1918, by which Congress specifically provided relief from high rates of the excess-profits tax to that portion of the income of a corporation which, if constituting the sole trade or business, would

Syllabus

bring it within the class of personal-service corporations in which capital must not be a material income-producing factor. The relief sought in the *Lane case* was denied in an opinion by Judge Booth. The facts in the two cases differ materially. It is stated in the opinion, "The plaintiff's system of accounting, reflected in bookkeeping, disclosed the income received from its various sources but did not disclose an allocation of invested capital to any one or more of its alleged branches," and further, "In keeping its books it never occurred to plaintiff that its business embraced five distinct and separate branches, for its accounts were not so kept, and it required the services of an expert to make an allocation of income thereto." The evidence in the instant case shows quite the reverse of this situation. There was no invested capital in plaintiff's brokerage business, except the mere expense of maintaining an office and a force of clerks and other employees ranging in number from five to twenty persons. Furthermore, plaintiff's books were kept in such a manner as to determine with unerring accuracy the separate incomes from the two branches of plaintiff's business. The reasoning of the court in the opinion in the *Lane case* tends to sustain the theory of plaintiff in this case.

The court is of the opinion that the method employed by plaintiff in computing his tax liability for the period in question was correct and that he is entitled to recover. It is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

HARDWARE UNDERWRITERS AND NATIONAL HARDWARE SERVICE CORPORATION v. THE UNITED STATES

[No. C-1277. Decided April 2, 1928]

On the Proofs

Insurance tax; reciprocal or interinsurance exchange; conduct of business through attorney in fact and advisory committee.—In a reciprocal or interinsurance exchange, made up of individuals who issue and thereby secure insurance among themselves

through a common attorney in fact and an advisory committee, whose deposits, made to cover their expenses and losses, less the attorney's compensation, are held in trust by the advisory committee, and to whom is regularly returned savings over and above an adequate surplus and reserve fund, the deposits so made are premiums and the individuals comprising the exchange are persons within the meaning of the revenue laws imposing taxes on the issuance of insurance policies. Such an exchange, when it does business with subscribers in 27 States of the Union, is not an "organization of a purely local character," and where a part of its income is derived from the investment of deposits, its income does not consist "solely of assessments, dues, and fees" (sec. 11(a), Tenth, revenue act of 1916; sec. 231 (10) revenue act of 1918).

The Reporter's statement of the case:

Mr. Daniel V. Howell for the plaintiffs. *Messrs. Joseph S. Brooks* and *Charles M. Howell* were on the briefs.

Mr. C. R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Alexander H. McCormick* was on the briefs.

The court made special findings of fact, as follows:

I. Hardware Underwriters is and was during the period involved a reciprocal or interinsurance exchange.

National Hardware Service Corporation was incorporated under the laws of Illinois November 22, 1917. The name was at the time of such incorporation Leon D. Nish, Inc., a change to the present name being made pursuant to the laws of Illinois on April 14, 1923.

II. Claiming to act under section 504 of the revenue law of 1917 and section 503 of the revenue law of 1918, the collector of internal revenue for the first district of Illinois required Hardware Underwriters to make monthly returns from November 1, 1917, to December 31, 1921, for the purposes of tax on insurance under said sections. Said returns and payments of the tax assessed thereunder were made under protest. Said tax, so paid, amounted to $3,226.46.

Thereafter a claim for refund of said tax was submitted to the Commissioner of Internal Revenue and by him on April 9, 1923, rejected.

III. During the period from November 1, 1917, to December 31, 1921, upward of four thousand hardware merchants, consisting of individuals, partnerships, and corporations, called subscribers, through the medium of a common agent or attorney in fact were engaged in the fire-insurance business upon the reciprocal or interinsurance plan, with the common object and purpose of securing for themselves fire insurance at cost.

During the period from November 1, 1917, to December 31, 1921, Leon D. Nish, Inc., a corporation, was the attorney in fact for said subscribers and was authorized by said subscribers as their attorney in fact to exchange (issue), and did exchange (issue) contracts of indemnity to each subscriber, each executed in the name of the subscribers by Leon D. Nish, Inc., attorney in fact.

The subscriber at the time when his contract went into effect was required to pay a sum of money fixed by the attorney in fact, and payment of such sum of money was a necessary requisite to the insurance contract.

IV. The plan or system of reciprocal or interinsurance is one which has existed for many years in the various States of the Union under the common-law right of contract or under special insurance statutes and regulations of State insurance departments. The system and the laws and regulations governing same are uniform in substance and effect. Reference to the laws of the State of Illinois is hereby specifically made.

The plan followed in the instant case is typical and was as follows:

During the period involved about four thousand hardware merchants and dealers, residents of Illinois and other States, desiring to indemnify each other from loss by fire on their business property, executed to Leon D. Nish, Inc., separate and individual powers of attorney. A form of such power of attorney is attached to the petition as Exhibit "A" and is made a part hereof by reference.

Acting under such powers of attorney the attorney in fact, Leon D. Nish, Inc., effected the exchange of these contracts of indemnity by issuing to said subscribers individual con-

tracts in and for each of the other several subscribers who had so empowered said attorney in fact to act for them, by which contracts each of said subscribers agreed to insure the specific property of each recipient of said contracts against loss or damage by fire. Such contracts issued at various dates and were for terms of one or five years and in specified amounts. Such a contract was in form and substance identical with Exhibit "B" attached to the petition and made a part hereof by reference.

At the time of the execution of such contracts of indemnity each subscriber deposited with the attorney such an arbitrary amount as the attorney, in his judgment, thought requisite to secure the performance by said subscriber of his contract with each of the other subscribers. The nature of the risk was an element considered by the attorney in determining the amount of deposit to be made.

The amount so designated by the attorney was paid at the beginning of each year.

All moneys received by the attorney in fact from subscribers, less the compensation of the attorney in fact, together with interest earned on investments, were deposited in a local bank, commingled in one fund to the credit of the advisory committee, trustee for the subscribers, or commingled by investment in United States bonds by the advisory committee as trustee of the subscribers.

Each subscriber, however, had a separate ledger account, which showed the amount of his deposit, the additions thereto resulting from interest earned, and the deductions therefrom on account of expenses and losses.

Losses chargeable against the deposit of the subscriber were determined in accordance with the ratio of the subscriber's total annual deposit to the sum of the individual deposits of the other subscribers. Interest earned was first applied to such losses, the deposit being applied to the balance. If at the end of the year, after deducting the amount paid out for expenses and losses, there remained a balance to the account of the subscriber, 50 per cent of said balance was returned to the subscriber and the other 50 per cent remained in the account of the subscriber as a reserve and surplus. At the final termination of the relationship as

subscriber, he received the balance of his deposit as reduced by expenses and losses, together with the entire amount credited to him as a reserve and surplus.

V. During the period from November 1, 1917, to December 31, 1921, the subscribers were changing from time to time during the course of each and every year, by reason of the expiration of the subscriber's contract, cancellation by the subscriber, or cancellation by the attorney in fact for failure to make payment of money required. Those ceasing to be subscribers have been paid the amounts due them in full and their accounts closed.

VI. Policies of reinsurance reinsuring subscribers at Hardware Underwriters, Elgin, Illinois, were placed with various insurance companies.

VII. Meetings of the subscribers were held annually, at which they considered their business and elected members of the advisory committee.

VIII. All of the taxes sought to be recovered in this action were paid with moneys belonging to the subscribers, the last payment on account of said taxes being made February 1, 1922, and no part of said taxes paid to the collector of internal revenue was paid with funds belonging to Leon D. Nish, Inc.

IX. Rules and regulations of the advisory committee of subscribers at Hardware Underwriters as provided by the subscribers' agreement contains, among others, the following provisions:

ARTICLE 6

The chairman, vice chairman, and manager shall constitute an executive committee, which committee shall have the general supervision and control of the affairs of Hardware Underwriters during the periods intervening between the meetings of the advisory committee and shall meet at such times as may be necessary on call of chairman or manager.

The executive committee shall audit and approve the monthly bill of expense and all claims for losses; make loans and investments of the funds of subscribers, agreeable to the provision of the law; to call in and reloan or reinvest the same as the interest of the subscribers may require, subject to the provision of the law; also to consent to the substitution of new or other securities for loans in place of those already held, when in their judgment the interests of the subscribers

at Hardware Underwriters require such substitution. The securities of subscribers shall be kept with some good bank to be selected by the committee. Any change or removal of securities requires the presence of the chairman or manager and one of the committee.

ARTICLE 9

The attorney in fact for the subscribers shall be manager of Hardware Underwriters and the secretary of the advisory committee, and under the direction of the advisory committee and of the executive committee shall have the supervision and control of Hardware Underwriters; he shall collect deposits on policies issued, bills and accounts receivable, interests, rent, and all other items of income, and deposit the funds of the subscribers in banks or invest in securities approved by the advisory committee. All such deposits or investments shall be made in the name of the advisory committee, as trustee. He shall keep records of the business of Hardware Underwriters and a separate individual account with each subscriber, and said account to be open to the inspection of the subscriber.

ARTICLE 10

No general surplus fund shall be accumulated but for the greater security of the contract holders, as provided for in subscribers' agreement, each year a portion of the subscriber's yearly savings shall be returned to them in cash and the balance of the savings passed to their individual account as their individual surplus and reserve, after an amount equal to one annual deposit (premium) has been so accumulated to an individual subscriber. Thereafter, each year all their savings shall be returned in cash or credited on next succeeding annual deposit as part payment.

ARTICLE 11

Should a subscriber cancel his subscription at any time within thirty days the management of Hardware Underwriters will liquidate his account and return in cash the net surplus and reserve fund remaining to his credit.

ARTICLE 12

Policies of insurance to be issued shall be for a term of not exceeding one year, provided however, that limited contracts may be made for a term of three or five years which shall

terminate by limitation at each recurring annual date borne by such contract unless the "annual expense and guarantee-fund deposit" is paid on or before the anniversary of the date borne by such contract. The maximum net amount of insurance held in any one risk shall not exceed eight thousand ($8,000.00) dollars. The amount and rate of annual deposits shall be from time to time fixed and regulated by the attorney in fact and the applicant for insurance shall deposit with the attorney an amount equal to one year's premium for such insurance in cash. On household goods, residences, and other risks on which it is customary to write contracts for a term of years, the rate of annual deposit shall be one-fifth five years premium for such insurance.

X. Assets and liabilities of subscribers at Hardware Underwriters, shown by report of examinations of their accounts and records made by Smith, Brodie & Lunsford, certified public accountants, appeared as follows:

HARDWARE UNDERWRITERS, ELGIN, ILLINOIS

Assets and liabilities, December 31, 1918

Assets:	
Cash in bank and in office	$5, 177. 97
Certificates of deposit	15, 957. 19
U. S. Liberty loan bonds	76, 424. 00
Subscribers' deposits in course of collection	5, 400. 10
	102, 959. 26
Liabilities:	
Losses in process of adjustment	1, 450. 87
Surplus to credit of subscribers	101, 508. 39
	102, 959. 26

Assets and liabilities, December 31, 1919

Assets:	
Cash in bank and in office	$12, 778. 48
Certificates of deposit	10, 043. 60
U. S. Liberty loan bonds	138, 910. 62
Subscribers' deposits in course of collection	10, 864. 98
	172, 597. 68
Liabilities:	
Losses in process of adjustment	135. 00
Surplus to credit of subscribers	172, 462. 68
	172, 597. 68

Reporter's Statement of the Case

Assets and liabilities, December 31, 1920

Assets:	
Cash in office and in bank	$6,336.16
Certificates of deposit	10,000.00
U. S. Liberty loan bonds	209,178.21
Subscribers' deposits in course of collection	15,254.54
	240,768.91
Liabilities:	
Losses in process of adjustment	8,556.89
Due for reinsurance	1,867.18
Due for attorney in fact	3,813.64
Surplus to credit of subscribers	226,531.20
	240,768.91

Assets and liabilities, December 31, 1921

Assets:		
Cash in office and in bank		$2,951.29
Certificates of deposit		10,000.00
U. S. Liberty loan bonds		224,977.42
Deposits in course of collection		21,605.39
Accrued interest		1,569.79
		261,103.89
Liabilities:		
Losses adjusted and in process of adjustment (estimated)		11,044.35
Reinsurance payable		3,282.69
Due attorney in fact		5,401.35
Subscribers' surplus—		
Statutory reserve (Illinois law)	$106,944.50	
Surplus in excess of statutory reserve	134,431.00	
		241,375.50
		261,103.89

The surplus shown on December 31, 1918, $101,508.39, is net income (or "saving to subscribers") of $143,105.77. less "savings returned to subscribers" of $41,597.38. It is what is left after distribution and represents the amount reserved not for distribution but for the purposes of the business. It is provided for in the power of attorney and in the advisory committee's regulations. Except for detail the same conditions apply to other years.

XI. Leon D. Nish (Inc.) was, during the period involved in this suit, licensed by a majority of the States to exchange

indemnity contracts or reciprocal contract insurance between subscribers and conducted such business with subscribers in 27 States of the Union.

XII. A so-called mutual insurance company must be, under the laws of Illinois and the other States of the Union, a corporation.

The premiums paid to a mutual insurance company become the property of the corporation for the assumption of liability under its policy of insurance, and a member of the mutual has no further rights or interest therein and is not entitled to any dividend from the savings upon said premiums upon said member's withdrawal nor until and unless the board of directors shall declare a dividend, which dividend is distributable to the then members of said mutual regardless of when, or out of whose premiums, the surplus out of which the same is paid was accumulated. Upon the liquidation of a mutual insurance company the assets are distributed to the last or then members, regardless of the fact that the assets may consist in part of a surplus created by the premiums of former members.

XIII. An insurance premium is a contribution (money) by the member in a mutual, subscriber in a reciprocal, or a policyholder in a stock company for the purpose of securing indemnity against loss that might occur from various hazards.

The court decided that plaintiffs were not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a suit brought by the Hardware Underwriters and the National Hardware Service Corporation, a corporation described as attorney in fact and trustee, to recover monthly premium taxes assessed and collected by defendant under the provisions of sections 504 (b) of the revenue act of 1917 and 503 (b) of the revenue act of 1918, respectively, for the period beginning November 1, 1917, and ending December 31, 1921.

During this period about 4,000 hardware merchants, made up of individuals, partnerships, and corporations, called

subscribers, through a common agent or attorney in fact were engaged in the business of making, issuing, and renewing fire-insurance contracts upon the reciprocal or interinsurance plan, with the common object of securing fire insurance and protection for themselves at cost.

Each subscriber applying for insurance executed a subscriber's agreement in common or identical form appointing Leon D. Nish (Inc.) (this name was changed to National Hardware Service Corporation since this suit was brought), attorney in fact. The essential details of this agreement are discussed further on.

During said period there was issued to each subscriber an insurance contract executed in the name of the subscribers by Leon D. Nish (Inc.) as attorney in fact, and each subscriber at the time his contract went into effect was required to pay a sum fixed by the attorney in fact, payment of which was a necessary prerequisite to the issuance or renewal of the insurance contract.

All moneys received by the attorney in fact, less 25% for his compensation, expenses, etc., and all interest earned on cash in bank and on investments were deposited in bank and commingled in one common fund to the credit of the advisory committee, trustee for the subscribers.

The meetings of the subscribers were held annually, at which the advisory committee was elected and reports were received from said committee. The advisory committee was authorized to and did adopt rules and regulations for the conduct of the subscribers' business. They selected a chairman, vice chairman, and treasurer, and named an executive committee to have general supervision and control of the business between the meetings of the advisory committee. Under the rules and regulations the attorney in fact acted under the direction of these committees.

A surplus was accumulated to the credit of the subscribers and was in the hands of the advisory committee as trustee for the subscribers.

All taxes sought to be recovered in this suit were paid with money of the subscribers from the common fund. No part of it was paid with money belonging to Leon D. Nish (Inc.).

Opinion of the Court

The subscribers were changing from time to time during each year by reason of the expiration of contracts, the making of new contracts with new subscribers, the cancellations by subscribers or cancellation by the attorney in fact when money called for was not paid. So that many subscribers who were such at the time the taxes were paid have ceased to be subscribers and have been settled with and their accounts closed.

The association did a large business of reinsurance with other companies, was licensed by a majority of the States, and conducted its business with subscribers in 27 States of the Union.

The applicable statutes [3] are quoted below.

In order to reach a proper conclusion in the matter it is necessary to analyze somewhat the character of the plaintiffs, their purpose, and the end accomplished.

[3] Sections 504 and 505 of the revenue act of 1917, 40 Stat. 315, 316:

"SEC. 504. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid the following taxes on the issuance of insurance policies:

* * * * *

"(b) Marine, inland, and fire insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or other instrument by whatever name the same is called whereby insurance is made or renewed upon property of any description (including rents or profits), whether against peril by sea or inland waters, or by fire or lightning, or other peril: *Provided*, That policies of reinsurance shall be exempt from the tax imposed by this subdivision.

"SEC. 505. That every person, corporation, partnership, or association issuing policies of insurance upon the issuance of which a tax is imposed by section five hundred and four, shall, within the first fifteen days of each month, make a return under oath, in duplicate, and pay such tax to the collector of internal revenue of the district in which the principal office or place of business of such person, corporation, partnership, or association is located. Such returns shall contain such information and be made in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe."

Sections 503 and 504 of the revenue act of 1918 (40 Stat. 1104):

"SEC. 503. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 504 of the revenue act of 1917, the following taxes on the issuance of insurance policies, including, in the case of policies issued outside the United States (except those taxable under subdivision 15 of Schedule A of Title XI), their delivery within the United States by any agent or broker, whether acting for the insurer or the insured; such taxes to be paid by the insurer or by such agent or broker:

* * * * *

"(b) Marine, inland, and fire insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or other instrument by whatever name the same is called whereby insurance is made or renewed upon property of any description (including

What is the purpose of this association? It is to secure the making of insurance, and in the pursuit of that purpose, it issues policies, collects premiums, and pays losses. From the fund collected as premiums a certain percentage is set aside for expenses. The balance of the fund arising from deposits or premiums and income from investments is placed in bank subject to check and from it are paid the losses. The only difference between it and the ordinary mutual insurance company is that the subscribers do not mutually guarantee each other's losses. But the result is the same. The purpose is insurance solely for the benefit of the members of the association and those insured; that is, there are no stockholders as in the ordinary insurance company, the members reaping the benefits and making good the losses. In addition to the attorney in fact its organization consisted of an advisory committee, elected annually, which elected a chairman, vice president, and a manager. These officials constituted the executive committee and had general supervision and control of the affairs when the advisory committee was not in session. The association is not incorporated, but this does not alter the fact that it is, in substance and in result of its operations, a mutual insurance company or a

rents or profits), whether against peril by sea or inland waters, or by fire or lightning, or other peril.

"SEC. 504. That every person issuing policies of insurance upon the issuance of which a tax is imposed by section 503 shall make monthly returns under oath, in duplicate, and pay such tax to the collector of the district in which the principal office or place of business of such person is located. Such returns shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the Secretary, may by regulation prescribe.

"The tax shall, without assessment by the commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due."

TITLE I. GENERAL DEFINITIONS

Section 1 (40 Stat. 1057):

"SECTION 1. That when used in this act—

"The term 'person' includes partnerships and corporations, as well as individuals;

"The term 'corporation' includes associations, joint-stock companies, and insurance companies; * * *

"The term 'taxpayer' includes any person, trust, or estate subject to a tax imposed by this act."

reciprocal association for the purpose of making insurance and securing protection and paying losses. Its method is for each member to make a deposit with the attorney in fact, who has a fixed office, and is the attorney in fact for each and every person entering the association, and nominally, as a matter of bookkeeping, the deposit of each member is kept separate from the others, but, after deducting a percentage for expenses, etc., the whole of the fund secured from the members is deposited as one fund in the name of the trustees. The attorney in fact decides who shall be insured, solicits the insurance, issues the policies, cancels them when premiums are not paid, and pays the losses out of the general fund in bank with the approval of the advisory committee. To say that such an association is a mere place is to say that a written constitution that has been put in operation is still nothing more than a scrap of paper. This association is not a mere place; it is a living entity doing an insurance business through cooperation of its subscribers with the attorney in fact and advisory committee and performs all those things necessary to carry on effectively the business of making insurance.

Let us look at this so-called attorney in fact, in this case a corporation. It will be seen that it is not the case of an ordinary attorneyship in fact. There is joined with it a distinct and real interest which pervades and controls the operations of the association. His power of substitution can be vetoed only by the advisory committee, chosen annually by the subscribers. This body also passes upon the investment of funds and deposits by the attorney, and payment of losses is by and with its advice and consent.

The attorney decides as to who may be accepted as subscribers, what rates of indemnity must be paid, what subscribers must pay from time to time to meet good losses, cancellation of contracts and thus the termination of the subscribers' relations with the association, the settlement and payment of losses with the approval of the advisory committee, the compromise of claims—in short, practically all of the powers which a board of directors might exercise, in addition to certain important ones which they could not. The attorney in fact for his services as the director of the

concern receives a certain fee from each subscriber on his application for insurance, 25% of all commissions received; and out of it he pays all expenses incident to conducting the exchange of insurance authorized, except losses in adjusting losses, fees and taxes, legal expenses, and expenses of the advisory committee. He is therefore much more than the ordinary attorney in fact. He is the engine for which the subscribers furnish the fuel. From the foregoing it is plain that the attorney and the subscribers are in cooperation in the accomplishment of a certain purpose.

It is not necessary to classify this concern as an association. The statute uses the word "person." This, of course, includes the plural. If these persons, whether technically or not, in effect are an association, issue insurance policies, whether unto themselves or others, the tax is payable. The name of the business or the place where it is transacted is not material. The right to tax does not depend upon either.

It is contended that the subscribers are individuals and separate; that their transactions are individual and not connected; that what is paid by each subscriber is a deposit and not a premium; that each subscriber has a separate contract of indemnity for loss with each of the other members and is liable on a separate undertaking. But this is mere theory. When it comes to an examination of the practice it has no application. The subscribers do not issue the policies and do not pay the losses. They are assessed from time to time to cover losses and expenses. The controlling factor who fixes the amount of this assessment is the attorney in fact, not the subscribers, and, if the subscribers fail to pay, their insurance ceases and their relations as subscribers are terminated. The attorney adjusts a loss where it occurs and pays it from the accumulated fund. The investments are made by the attorney, with the approval of the advisory committee, and the reservations maintained out of funds not immediately required, and to all practical and outward indications the attorney in fact runs the business as any other large business is run. The fact that the business is not conducted solely for profit does not relieve it from taxation. Whatever

the plan of bookkeeping may be, the premiums, less the attorney's commission, are placed in bank as a whole, and losses and expenses are paid out of it without action by or reference to the subscribers, individually or collectively, or contribution by them other than by the payment of premiums.

The tax is imposed upon the issuance of the policy; that is, the contract of indemnity, the amount being regulated by the premium paid. The contract of indemnity in this case was issued by a central agency, thus fixing liability for taxation for the issuing of the policy under the revenue act, and the amount of tax payable was fixed by the premium which was received. The power of attorney authorizes the attorney in fact to pay taxes out of premium receipts, presumably all lawful taxes.

There is nothing in the act which interferes in any way with the power of Congress to tax an association, which, although unincorporated, transacts its business as if it were incorporated, and the power to tax such an association is not affected by the fact that under the law of the State in which it does business it is not regarded as a legal entity where the shareholders are individually liable for its deeds. *United States* v. *Childs*, 266 U. S. 304, 309; *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110; *Steedman et al.* v. *United States*, 63 C. Cls. 226; *Mary S. Aldridge, executrix*, v. *United States*, 64 C. Cls. 424; *Boston & Maine R. R.* v. *United States*, 265 Fed. 578; and *N. Y., N. H. & H. R. R.* v. *United States*, 269 Fed. 907.

An "association" has been defined, with approval by the Supreme Court, "as a body of persons organized for the prosecution of some purpose, without a charter but having the general form and mode of procedure of a corporation." It is clear in this case that the individuals or subscribers were engaged in the prosecution of a common enterprise, to wit, the business of a mutual insurance company, and had the general purpose and accomplished the same end as a formally incorporated association.

The purpose of the policyholder in both a mutual company and reciprocal association such as this is to obtain insurance

at cost. The policyholders are the ultimate insurers in either case. The premiums or deposits, or whatever they may be called—because the name is not important, as in each case it is a sum paid for protection—provide the funds for payment of losses and expenses and to maintain those reserves which the law requires. These premiums are irrevocably pledged for the payment of these losses and expenses. *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U. S. 523, 533 *et seq.*

This association is a taxable entity. The court will regard the methods and forms used for the prosecution of a common enterprise; that is, insurance business conducted through an unincorporated association with a common purpose and with a common plan of cooperation. See *Burk-Waggoner Oil Association* v. *Hopkins*, *supra*, and *John L. Pickering* v. *Alyea-Nichols Co.*, 21 Fed. (2d) 501. In the latter case the principles involved in the instant case are very fully and clearly discussed by Judge Alschuler, who delivered the opinion of the court.

The next question raised here is whether under the statute this association is exempt from taxation. There is a stipulation in connection with this case, signed by nineteen other associations of similar kind, agreeing to be bound by the decision in this case. Therefore it appears that the construction given the statute in this case by the Commissioner of Internal Revenue has been of frequent and general application, and the interpretation is therefore entitled to weight with a presumption in its favor. *United States* v. *Philbrick*, 120 U. S. 52, 59; *National Lead Co.* v. *United States*, 252 U. S. 140, 145.

Without going into a discussion of the question at length, it seems sufficient to say that the question of exemption must be confined to the statutes in force during the years when the taxes in this case were paid, i. e., from 1917 to 1921. The proceedings in Congress on the act of 1924 show a refusal to specifically exempt reciprocal and interinsurance companies or associations, though by the act of 1926 it did exempt them. This clearly indicates that in the judgment of Con-

gress they were not exempt under the acts here in question. The statutes[4] as to exemption are quoted below.

In approaching the question of exemption we must regard the rule that the exemption should be construed strictly and in favor of the Government, and that it must be denied if there is doubt. *Swan & Finch* v. *United States*, 190 U. S. 143, 146; *Cornell* v. *Coyne*, 192 U. S. 418, 431; *Bank of Commerce of Tennessee* v. *Tennessee*, 161 U. S. 134, 146; *Phoenix Fire & Marine Insurance Co.* v. *Tennessee*, 161 U. S. 174, 177; *New York Trust Co.* v. *United States*, 63 C. Cls. 100, 102.

The claim for exemption must be clearly made out. Taxes being the sole means by which the State can maintain its existence, any claim on the part of anyone to exemption from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language upon which the claim is based. It has been said that where there is a well-founded doubt it is fatal to the claim. The provision of the statute involved here is section 231 (10) of the revenue act of 1918, 40 Stat.

[4] Section 504 (d) of revenue act of 1917, 40 Stat. 316:

"(d) Policies issued by any person, corporation, partnership, or association, whose income is exempt from taxation under Title I of the act entitled 'An act to increase the revenue, and for other purposes,' approved September eighth, nineteen hundred and sixteen, shall be exempt from the taxes imposed by this section."

Section 503 (d) of the revenue act of 1918, 40 Stat. 1104:

"(d) Policies issued by any corporation enumerated in section 231, and policies of reinsurance, shall be exempt from the taxes imposed by this section."

Specifically section 11 (a) (10) of the revenue act of 1916, 39 Stat. 766–767:

"SEC. 11. (a) That there shall not be taxed under this title any income received by any—

* * * * *

"Tenth. Farmers' or other mutual hail, cyclone, or fire insurance company, mutual ditch or irrigation company, mutual or cooperative telephone company, or like organization of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting its expenses."

And section 231 (10) of the revenue act of 1918, 40 Stat. 1075–1076:

"SEC. 231. That the following organizations shall be exempt from taxation under this title—

"(10) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses."

1075, 1076, *supra*. It will be seen that this act, after enumerating the character of companies to be exempt, uses the language "or like organizations of a purely local character." The words "purely local character" give a very clear description. They refer to organizations whose business is confined to a locality, whose subscribers come from that locality. They pertain in a sense to a fixed place or a limited portion of the country, having reference to a certain determinate portion of country, limited and identified with a given area or region. We speak of a local question, local customs and observances, of a board administering local affairs, of a local statute which affects a particular locality or its inhabitants. So that the word "local" has a distinctly confined meaning and is to be contradistinguished from "general," that is, widespread, common to a greater number, large or unlimited in scope, not restricted in application or place, as opposed to "local."

A few facts will clearly indicate that the association involved here was not local in character. It had 4,000 subscribers. It did business in 27 States. Reciprocal and interstate exchanges were licensed to do business by it in 32 States, and it places a large amount of reinsurance with other companies. The statute intended to confine the exemption to associations or companies of a purely local character. The association here was not of that character, and is not within the exemption.

Further, the statute uses this language:

"* * * the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses."

The income of this association did not consist solely of "assessments, dues, and fees collected from members." If it did not consist solely of these, it is not within the exemption. It had income from large investments in certificates of deposits and United States bonds (see Finding IV), and this income, as stated, was deposited and commingled with the general fund of the association in bank and used for the purpose of paying expenses. It was income derived from investments. Certainly there is at least a grave doubt as to

whether the plaintiffs come within the exemption, and it must be held that they are not entitled to be exempted. The petition should be dismissed, and it is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

ROBERT W. JOHNSON, JR., JOHN S. JOHNSON, AND EVANGELINE B. JOHNSON, BENEFICIARIES UNDER THE WILL OF ROBERT WOOD JOHNSON, v. THE UNITED STATES

[No. E-375. Decided April 2, 1928]

On the Proofs

Income tax; trust fund of estate; division into three trusts.—The will of plaintiffs' testator, after directing that certain payments should be made from the income of his estate, provided: "I direct my trustees to hold and invest and * * * reinvest all the remainder of such income and to hold and retain the same and all accumulations thereof in order that said trust fund may increase and keep the same intact until my said three children * * * shall respectively arrive at the age of twenty-five years, dividing the said trust fund, however, into three equal parts, one of the said parts to be so held for each of my said children, respectively, and in adding to such fund from * * * income of my estate * * * I direct that such additions shall be made equally to each of said three parts and as my said children shall respectively arrive at the age of twenty-five years the principal of such portion of said accumulated fund so held for such child shall be paid to such child or the lawful issue thereof." *Held*, that the trust so created was that of one fund, the provision for dividing it being merely directory, and that an assessment by the Commissioner of Internal Revenue of income tax against the estate on the basis of one trust, taxable as an entity, instead of three separate trusts, was correctly made.

The Reporter's statement of the case:

Mr. Paul Myers for the plaintiffs. *Williams, Myers, Quiggle & Breeding* were on the brief.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Robert Wood Johnson, of New Brunswick, New Jersey, died February 6, 1910, leaving a will, a true and correct copy of which is attached to the petition as Exhibit A and made a part hereof by reference.

II. The estate of Robert Wood Johnson, by its trustees appointed by said will, made, at the proper time in 1918, a return for Federal income-tax purposes covering the calendar year 1917, and on June 15, 1918, paid the tax shown therein, amounting to $45,235.77, to the collector of internal revenue at Newark, New Jersey. On October 19, 1922, the said estate filed a nontaxable amended return for the calendar year 1917 on Form 1041, setting forth a distribution of the income of the estate for 1917 equally for the three children of the testator, viz, Robert W. Johnson, jr., John S. Johnson, and Evangeline B. Johnson, and on the same date, to wit, October 19, 1922, Robert C. Nicholas, one of the trustees named in the will of Robert Wood Johnson, deceased, filed three separate returns, one as trustee for Robert W. Johnson, jr., one as trustee for John S. Johnson, and one as trustee for Evangeline B. Johnson, reporting in each the income distributed to the trustee by the estate for each beneficiary. The said three returns filed by the trustee as aforesaid set forth a total tax liability of $18,526.41. The aforesaid trustee thereupon, on October 22, 1922, filed with the said collector of internal revenue a claim for refund of $26,709.39 tax paid for 1917.

III. The said claim for refund was rejected by the Commissioner of Internal Revenue on June 14, 1923, and again on August 19, 1924. On or about June 16, 1923, the Commissioner of Internal Revenue notified the said trustees of a proposed additional assessment of income tax for 1917 against the said estate in the amount of $13,318.88. The additional assessment was thereafter made, and on August 29, 1924, the said trustees paid, upon notice and demand and under protest, to the collector of internal revenue at Newark, New Jersey, the said additional assessment of $13,318.88, plus interest, amounting to $317.43, or a total payment of $13,636.31. The trustees immediately filed with the said collector a claim for refund of the said amount of $13,636.31,

claiming that the will of Robert Wood Johnson created three trusts, each in itself a taxable entity, instead of one trust taxable as a single entity, and that the dividends paid by Johnson & Johnson, New Brunswick, New Jersey, on February 8, 1917, were paid out of 1916 earnings, and therefore should be taxed at 1916 rates. On or about January 30, 1925, the said claim was rejected by the Commissioner of Internal Revenue.

IV. On February 8, 1917, the trustees of the estate of Robert Wood Johnson received dividends totaling $85,568.00 on its stockholdings in Johnson & Johnson, New Brunswick, New Jersey, as follows: $32,288.00 on preferred stock and $53,280.00 on common stock. The Commissioner of Internal Revenue has determined that only $42,666.62 of the said $85,568.00 is taxable at rates prescribed by the revenue act of 1916, while the balance, or $42,901.38, is taxable at rates prescribed by the revenue act of 1917. The said trustees take the position that the entire amount of $85,568.00 should be taxed at 1916 rates.

V. On February 6, 1917, the board of directors of Johnson & Johnson held a semiannual meeting, the minutes of which contain the following:

"On motion of Mr. Jones, duly seconded, a semiannual dividend of 4% on preferred stock and 3% on the common stock was declared, payable at the discretion of the treasurer."

The treasurer's report, which was submitted to the board of directors at the said meeting held on February 6, 1917, disclosed the earnings of the corporation for the year 1916. The total dividend declared on the preferred and common stock on February 6, 1917, amounted to $163,000.00, and the stockholders who received the said dividend on February 8, 1917, were notified that the dividend was paid out of 1916 earnings of the corporation. The net earnings of the corporation from operations from January 1, 1917, to June 30, 1917, were $464,735.34. The Commissioner of Internal Revenue acted upon the theory that a proportionate part of said six months' net earnings was earned prior to February 8, 1917, and accordingly, in computing the amount of the said dividend taxable at 1917 rates, he apportioned a part of the

said net earnings to the first 38 days of 1917, to wit, $83,720.84. The total net earnings of the corporation for the calendar year 1917 were $1,451,779.22, and the total dividends declared in 1917 were $425,000.00. The surplus on December 31, 1916, as shown by its books of account, was $1,898,701.30.

VI. Johnson & Johnson close their books twice a year; that is, on June 30 and December 31. For a long period of years, including the years here in question, it has been the custom of the board of directors of said corporation to meet during the first or second week of February and August of each year, after the books of the company have been closed for the preceding six months' period ending December 31 and June 30, and dividends have been declared at such meetings.

VII. If under the provisions of the will of Robert Wood Johnson three separate taxable trusts were created, each in itself a taxable entity, and the dividends received by such trusts are taxable partly at 1916 rates and partly at 1917 rates, as apportioned by the Commissioner of Internal Revenue, the amount recoverable in this suit would be $33,902.12, with interest on $20,265.84 thereof from June 5, 1918, and on $13,636.28 thereof from August 29, 1924. If the said will created but one trust, taxable as a separate entity, and if the dividends are taxable as determined by the Commissioner of Internal Revenue, no amount is recoverable in this suit.

The court decided that plaintiffs were not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court[1]:

This case was heard on a stipulation of facts, which the plaintiffs state in their brief to be "the entire facts out of which this controversy arises." The court has adopted the stipulation as its special findings of fact.

The question here arises out of the construction of the third paragraph of the will quoted *infra*.

The Commissioner of Internal Revenue construed this paragraph as creating one trust fund undistributed and undistributable in 1917, and assessable for that year as a single

[1] Filed May 28, 1928.

entity. The plaintiffs contend that it created three separate trust funds. The provision of the will is as follows:

"Third. (4th) After the foregoing annual payments shall have been made as aforesaid out of said income and after all of the aforesaid legacies shall have been made thereout, then I direct my trustees to hold and invest and from time to time to reinvest all the remainder of such income and to hold and retain the same and all accumulations thereof in order that said trust fund may increase and keep the same intact until my said three children by my wife Evangeline A. (that is, Robert Wood, John Seward, and Evangeline Brewster) shall respectively arrive at the age of twenty-five years, *dividing the said trust fund, however, into three equal parts, one of the said parts to be so held for each of my said children, respectively*, and in adding to such fund from the residue of said annual income of my estate as aforesaid I direct that such additions shall be made equally to each of said three parts and as my said children shall respectively arrive at the age of twenty-five years the principal of such portion of said accumulated fund so held for such child shall be paid to such child or the lawful issue thereof." (Italics ours.)

The applicable statutes are as follows:

Section 1, Title I, of the income tax act of September 8, 1916, as amended by the act of October 3, 1917, provides in part:

"(a) That there shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax of two per centum upon such income * * *."

Subsection (b) of section 1 of the said act emphasizes what is ordinarily referred to as a surtax upon the total net income referred to in section 1.

Section 2 (b) of the said act provides:

"Income received by estates of deceased persons during the period of administration or settlement of the estate shall be subject to the normal and additional tax and taxed to their estates and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income held for

future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: *Provided*, That where the income is to be distributed annually or regularly between existing heirs or legatees or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed. * * *"

If the fund in this case constituted one trust it is subject to a higher rate of taxation than if three trusts were created, and the aim of this suit is to relieve this trust fund of the higher tax by establishing that three trusts were created by the will.

The testator died on February 6, 1910. The tax involved is for the year 1917. When the trustees made their return for that year on June 15, 1918, they made it on the basis of the fund being one trust and not three. Thereafter, on October 19, 1922, the said estate filed a nontaxable, amended return for the calendar year 1917 on Form 1041, setting forth a distribution of the income of the estate for 1917 equally for the three children of the testator, and on the same date one of the trustees named in the will filed three separate returns as trustee for each of the plaintiffs, reporting in each the income distributed to the trustee by the estate for each beneficiary.

On October 22, 1922, a claim for refund was filed, which was rejected by the commissioner on June 14, 1923, and on or about June 16, 1923, the commissioner made an additional assessment of income tax for 1917 against said estate which was afterwards paid upon notice and demand and under protest, and the trustees immediately filed with the commissioner a claim for refund of the amount of $13,636.31 so assessed. This claim was rejected on January 30, 1925.

The reasons stated on the face of said claim for refund were that the will of the decedent created three trusts, each in itself a taxable entity, instead of one trust taxable as a single entity, and that the dividends received on February 8, 1917, were paid out of the 1916 earnings and were taxable at the 1916 rates.

The statute involved taxes income "of estates or any kind of property held in trust" where the income is not distributed. To the trustees under the will the testator gave and bequeathed the whole of his property in trust, and section 4 provided, after making certain bequests out of the income, that the trustees were to hold and invest "all the remainder of such income and to hold and retain the same and all accumulations thereof in order that said trust fund may increase and keep the same intact" until the three children shall respectively arrive at the age of 25 years, dividing the said trust fund, however, "into three equal parts, one of said parts to be so held for each of my said children." Here is a trust of what? The testator does not say that the remainder of his income shall be divided into three parts and each of the parts shall be held in trust for the benefit of certain of his children. He directs that the "remainder" of the income shall be held and retained in order that said "trust fund may increase and be kept intact" until the children arrive at the age of 25 years. He speaks of it as one fund and that it is to be held intact. It is true that he later uses the language above quoted, "dividing said trust fund into three equal parts," but here again he uses the word "fund." Further on he speaks of it as "said accumulated fund" and as the "portion" of said accumulated fund of each child therein. We are of the opinion that it was the intention of the testator to create one fund; that the provision for dividing it was simply directory and for the purpose of keeping the interests of the children equally divided. One fund was created. Each of the beneficiaries was to receive an equal share of the accumulated trust fund. The fund was to remain intact until one of the beneficiaries arrived at the age of 25 years, when his share was to be paid to him. We are of the opinion that the Commissioner of Internal Revenue properly assessed it as one fund.

The petition should be dismissed, and it is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

R. E. FUNSTEN CO. v. THE UNITED STATES

[No. F-80. Decided April 2, 1928]

On the Proofs

Excise tax; tax on candy; stuffed dates.—Stuffed dates, prepared by removing the seed and inserting in the place thereof a half of a kernel of a pecan and then rolling the date in or sprinkling it with granulated sugar, are not candies, and are not subject to the excise tax provided in subdivisions (9) and (6), respectively, of section 900 of the revenue acts of 1918 and 1921.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, R. E. Funsten Company, is a corporation organized under the laws of the State of Missouri, with its principal place of business at St. Louis, Missouri.

II. Plaintiff is, and for a long time has been, engaged in preparing, packing, and selling, among other products, stuffed dates; said stuffed dates were prepared by removing the seeds or pits therefrom and inserting in their place, in each date, a half of a kernel of a pecan and then rolling the dates in or sprinkling them with granulated sugar to absorb their natural juice and prevent them from adhering or sticking together. The dates so prepared were packed and sold in containers or packages of four different sizes, to wit, in boxes containing seven and fifteen pounds and in cardboard folding cartons holding two and ten ounces.

III. Between the dates of July 1, 1921, and December 31, 1923, there were levied, assessed, and collected from plaintiff, and paid by plaintiff to the United States collector of internal revenue at St. Louis, taxes in the amount of $8,242.49 under the provisions of subdivision (9) of section 900 of the revenue act of 1918 and subdivision (6) of section 900 of the revenue act of 1921 on the sale by plaintiff of so-called

stuffed dates prepared, packed, and sold as hereinbefore described.

IV. Plaintiff on January 21, 1925, filed claim for refund of said taxes amounting to $8,242.49 with the Commissioner of Internal Revenue, which said claim was allowed for $885.19, plus interest amounting to $93.12, representing tax with interest paid on the sale of stuffed dates sold in seven and fifteen pound boxes, and rejected for $7,357.30, which sum represented tax paid by plaintiff on the sale of said stuffed dates sold in the smaller containers of two and ten ounces.

V. The regulations of the Commissioner of Internal Revenue defining candy were adopted after receipt of a copy of a definition of candy adopted by the National Confectioners' Association after the passage of the revenue act of 1918. This is an association of companies engaged in the manufacture and preparation of candy and other confections.

VI. Stuffed dates (packed as the product here taxed was packed) are dealt with in commerce and sold by candy dealers, both wholesale and retail. Plaintiff's product, when packed in cartons containing 7 and 15 pounds, respectively, was not taxed as candy.

The court decided that plaintiff was entitled to recover $7,357.30 with interest from December 31, 1923, until date of judgment.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This is a suit to recover taxes paid, which the Commissioner of Internal Revenue refused to refund. The statute under which the taxes were exacted is expressed in the revenue act of 1918, 40 Stat. 1122, as follows:

"There shall be levied, assessed, collected, and paid upon the following articles * * * a tax equivalent to the following percentages * * * (9) Candy, 5 per centum."

The regulations of the commissioner promulgated in May, 1919, defined "candy" as follows:

"Art. 22. Candy—Candy within the meaning of the act includes chocolate creams, bonbons, gumdrops, jelly drops,

jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts, popcorn, and other cereals or cereal products mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate-covered marshmallows, candy cough drops, and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate whether plain or mixed with fruits or nuts; and all similar articles however designated."

The question presented is whether stuffed dates are taxable as candy under the act and regulations. The dates were prepared for market by a process described as follows: The seed of each date was removed and in its place the half of the kernel of a pecan was inserted. The dates were then sprinkled with granulated sugar to prevent them adhering or sticking together when packed. No process was used for the purpose of candying the sugar or forming a glacé. When prepared, as stated, the dates were packed in containers of different sizes and sold in boxes of seven and fifteen pounds and also in cardboard cartons of two sizes containing two ounces and ten ounces of dates. They were all similarly prepared. The commissioner ruled that the dates sold in the larger containers of seven and fifteen pounds were not taxable as candy and the Government concedes this is correct. The Government also concedes that the use of the sugar for the purpose mentioned does not make the product candy but insists that the dates packed in the smaller containers are candy within the meaning of the taxing act. The reasoning that makes the line of separation between dates and candy lie in the size of the containers is not easy to follow. If an article in a small box be candy it would seem that more of the same article in a large box would also be candy. The regulation does not include dates, such as we find here, unless we give a very unusual meaning to its concluding clause, "and all similar articles however designated." It mentions candies and a number of candied articles, fruits, nuts, etc., but "candied" involves generally a treatment of sugar or molasses by the application of heat. The phrase in the regulation must refer to the kind of things

already mentioned. The definitions by the lexicographers do not confuse candy with fruit, such as the date. Candy is one of the confectioneries, but all confections are not candy. The sale of the dates, prepared as shown here, in small containers, if conceded to be sold as confections does not constitute a sale of candy. The tax in question is an excise tax laid on various articles and things, among them candy. The quantitative method of determining the character of this article is not what the statute contemplates. The word should be interpreted according to its clear import. It has been declared that in statutes levying taxes the literal meaning of the words employed is most important because such statutes are not to be extended by implication beyond the clear import of the language used. *Merriam case*, 263 U. S. 179, 187; *Gould* v. *Gould*, 245 U. S. 151, 153. The plaintiff should have judgment. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

GEORGEINE S. LASHER v. THE UNITED STATES

[No. F-57. Decided April 2, 1928]

On the Proofs

Interest on tax refund; form of claim for refund.—Where a claim for refund of taxes, not on the printed form provided for by the Bureau of Internal Revenue, contains all the essential information required to be set out in said form, and was considered and allowed by the Commissioner of Internal Revenue, it sufficiently complies with the requirements of a claim as contemplated by statute and the taxpayer is entitled to the interest provided by section 1324 (a) of the revenue act of 1921.

The Reporter's statement of the case:

Mr. John W. Townsend for the plaintiff. *Mr. James Craig Peacock* was on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. J. H. Sheppard* was on the brief.

The court made special findings of fact, as follows:

I. On March 15, 1919, plaintiff filed her Federal income-tax return, Form 1040, for the year 1918, with the collector of internal revenue at Philadelphia, Pennsylvania. The taxable income shown by this return was $38,629.37, and the tax thereon was $7,430.10, which tax on March 15, 1919, was duly paid to the collector. Such tax was not paid under protest.

II. Thereafter the Commissioner of Internal Revenue (hereinafter referred to as the commissioner) determined plaintiff's taxable net income should be increased to $87,-924.70 and assessed an additional income tax against the plaintiff for the year 1918 in the amount of $11,308.48, which tax was duly paid in full on April 15, 1921, to the collector of internal revenue at Philadelphia, Pennsylvania.

III. Thereafter the commissioner, by letter dated June 22, 1922, proposed to assess against the plaintiff a second additional income tax for 1918 in the amount of $14,895.13, and notified plaintiff that she would be allowed twenty days within which to present any exception to the proposed assessment. On July 10, 1922, plaintiff duly filed exceptions to the proposed assessment, which were overruled by the Income Tax Unit in letter to her dated August 19, 1922. Thereupon, in accordance with the provisions of section 250 (d) of the revenue act of 1921 and article 1006 of Regulations 62, the plaintiff on August 26, 1922, duly filed an appeal to the commissioner. One ground of appeal, set forth in said appeal of August 26, 1922, was as follows:

"Referring to the last sentence of the third paragraph of letter dated August 19th, 1922, which states that no information has been submitted to show that the adjustments made in respect to income of the estate of George F. Lasher are in error, it is submitted that under proper application of the law and regulations the income of the estate of George F. Lasher could have no effect upon the tax liability of Georgeine S. Lasher for 1917–1918 and 1919 and any information which might have been submitted would not have been relevant to the question at issue, viz, the tax liability of Georgeine S. Lasher.

"But there may be pointed out the following errors in the computation of tax liability of the estate of George F. Lasher gathered from a reading of the report.

* * * * *

"Disallowance of depreciation (T. B. M. 56), inclusion of income from real estate, and personal estate in a single return. Failure to allow as a deduction from gross income Federal estate taxes accrued during the year. (Art. 134, Reg. 62.) * * *"

Attached to and as a part of said appeal was the following affidavit by the duly authorized agent of the plaintiff:

"G. H. Shryock, being first duly sworn, deposes and says as follows:

"That he is the same person named in a certain power of attorney executed by Georgeine S. Lasher on the 10th day of July, 1922, and filed with the Commissioner of Internal Revenue in accordance with regulations governing the practice of agents and attorneys before the Bureau of Internal Revenue.

"That the facts referred to as such in the foregoing appeal to the Commissioner of Internal Revenue are true to the best of his knowledge and belief.

"That the said appeal is not taken for the purpose of delaying the collection of the tax.

"That it is his belief and he so avers that Georgeine S. Lasher, the taxpayer on whose behalf this appeal is made, has paid an aggregate amount of income and surtaxes for 1917–1918 and 1919 which exceeds the aggregate amount of her actual tax liability for those years.

"Further this deponent saith not."

IV. Under date of May 29, 1923, the plaintiff, through her agent, wrote a letter to the commissioner, which was duly received by the latter, stating, so far as is here material:

"Reference is made to bureau letter dated June 22, 1922, addressed to Mrs. Georgeine S. Lasher, Rydal, Pa., advising that a reaudit of her income-tax returns filed for 1918 and 1919 disclosed a further tax of $14,895.13 and overpayment of $7,402.57, respectively; to letter dated July 10, 1922, protesting the assessment of the proposed additional tax for the two years; to bureau letter dated August 19, 1922, overruling the protest of July 10th, and to a further protest and appeal dated August 26, 1922; to a conference held October 20th, 1922, and bureau letter dated November 11, 1922, advising that office letter dated August 19, 1922, was rescinded and to an informal discussion of the question of the tax liability of Mrs. Lasher for 1917, 1918, and 1919

had on May 16th, 1923, with Mr. A. Lewis, chief of field review section, and Mr. Blum, as a result of which it was agreed that the correct tax liability for the several years should be determined as follows:

* * * * *

1918

"For this year the report of the revenue agent dated August 21, 1920, as supplemented by report dated May 11, 1921, was accepted as the basis of the tax, except the item of income from fiduciary, which item is to be corrected by deducting therefrom the amount of the Federal estate tax paid. The revenue agent states income from fiduciary as $88,470.94 ($78,931.73, report Aug. 21, 1920, plus $9,539.21 additional, report May 11, 1921), the estate tax paid was $65,753.50 as per photostatic copies of receipt and letter attached.

"Accordingly, the item of income from fiduciary, stated as $78,931.73 in report dated August 21, 1920, should be corrected to state $22,717.44 ($88,470.94 less $65,753.50), which correction indicates taxable income of $31,710.41 and tax liability as follows:

Net income	$31,710.41	Tax at 6%		$240.00
Exemption	1,000.00	Tax at 12%		3,205.25
		Surtax		2,049.46
Balance	30,710.41			
Taxable at 6%	4,000.00	Total		5,494.71
		At source		8.60
Taxable at 12%	26,710.41			
		Balance		5,486.11
		Paid:		
		Original	$7,430.10	
		Additional	11,308.48	
				18,738.58
		Overpayment		13,252.47

* * * * * *

"Accordingly, there is refundable to Mrs. Lasher overpayments as follows:

1917	$1,794.22
1918	13,252.47
1919	9,428.44
Total	24,475.13"

Said letter was not under oath.

V. Thereafter plaintiff received a letter from the commissioner's office, dated July 9, 1923, stating so far as is here material:

Reporter's Statement of the Case

"A reaudit of your individual income tax returns for the years 1918 and 1919 discloses the overassessments of $13,252.47 for the year 1918 and $7,448.05 for the year 1919, instead of an additional tax of $14,895.13 and an overassessment of $7,402.57 for the years 1918 and 1919, respectively, as per office letter of June 6, 1922, which is hereby superseded.

"The difference in the tax liability shown above is due to the following changes:

1918

"The allowance as a deduction to the estate of George F. Lasher of $65,753.50, Federal estate tax, results in the net income to you from the above-named estate of $22,717.44 instead of $88,470.94.

* * * * *

"The overassessment shown herein will be made the subject of certificates of overassessments which will reach you in due course through the office of the collector of internal revenue for your district * * *."

VI. On or about November 24, 1923, the plaintiff received certificate of overassessment No. 603515, showing the allowance of $13,252.47, which was the amount theretofore claimed as refundable by the plaintiff in her letter of May 29, 1923.

Forwarded with said certificate was the check of the Treasury Department for $13,252.47. The date of the commissioner's allowance of said refund was October 29, 1923.

VII. On November 27, 1923, plaintiff, through her agent, directed to the commissioner the following letter, which the commissioner in due course received:

"Receipt is acknowledged of check for $20,700.52, covering certificates of overassessment No. 603515 for $13,252.47 and No. 603516 for $7,448.05 for 1918 and 1919, respectively, in the case of the above-named taxpayer.

"In this connection your attention is called to the fact that of the $13,252.47 refunded for 1918, $11,308.48 was paid on April 15, 1921, pursuant to an additional assessment and under the provisions of section 1324 (a) (2) interest at one-half of one per centum per month is allowable from the date of payment, April 15th, 1921, to the date of the allowance of the claim.

"Will you kindly forward warrant to cover interest for the period mentioned?"

VIII. Said claim for interest was denied by the commissioner January 31, 1924, on the ground that—

"the refunds were made as the result of an office audit and not upon the allowance of a claim or claims for refund or credit."

An appeal to the commissioner from such decision was taken by plaintiff on Februrary 7, 1924, and with said appeal was transmitted a claim on Form 843 of the Bureau of Internal Revenue for the refund of $13,252.47. This claim was duly sworn to by the plaintiff on February 8, 1924, and the ground for same was stated therein as follows:

"Deponent verily believes that this application should be allowed for the following reasons:

"The amount indicated above as an overpayment was refunded under certificate of overassessment #603515, dated November 23, 1923, and this claim is filed to technically comply with the provisions of section 1324 of the revenue act of 1921 in respect to the payment of interest on refunds and refers and relates back to an informal claim filed under date of May 29, 1923, and technically completes this informal claim for a like amount."

IX. Said appeal was denied and claim for refund rejected by the commissioner in letter, dated April 28, 1925, which reads in part as follows:

"Reference is made to the claim dated February 8, 1924, for the refund of $13,252.47, * * * and in which it was stated that the claim was filed for the purpose of technically completing, and relates back to the informal claim presented under date of May 29, 1923. In connection with said claim, it was further held that it is a prerequisite to the allowance of interest that the refund or credit must be made pursuant to a claim for refund filed by the taxpayer, and that consequently interest is not payable under the provisions of section 1324–a of the revenue act of 1921 on the basis of a claim for refund filed subsequent to the allowance of the overassessment."

X. The commissioner has abided by his decision contained in said letter of April 28, 1925, and has not allowed or paid any interest to plaintiff upon said refund of $13,252.47.

XI. The said G. H. Shryock was at all times material to this case the duly appointed and acting agent and attorney in fact of the plaintiff, Georgeine S. Lasher.

Opinion of the Court

The court decided that plaintiff was entitled to recover interest at the rate of one-half of 1 per centum per month on $11,308.48 from April 15, 1921, to October 29, 1923, amounting to $1,722.66, and on $1,943.99 from February 26, 1923, to October 29, 1923, amounting to $78.73, the two items of interest aggregating the sum of $1,801.39.

Moss, *Judge*, delivered the opinion of the court:

This suit is brought for the recovery of $2,309.72, claimed by plaintiff as interest on a refund to plaintiff on account of an overpayment of income tax for the year 1918. The refund was for $13,252.47, $11,308.48 of which represented an additional tax paid April 15, 1921, and $1,943.99 of which was a part of the original tax paid at the time plaintiff's tax return was filed, March 15, 1919. The refund was allowed October 29, 1923, and was paid in November, 1923, without interest. Plaintiff immediately claimed interest under the provisions of section 1324 (a) (2) of the revenue act of 1921, which claim was rejected.

In the original petition filed February 4, 1926, plaintiff based her claim for the recovery of interest on the provisions of section 1324 (a) of the revenue act of 1921, 42 Stat. 316. Under this statute provision was made for the payment of interest on refunds made "upon the allowance of a claim for refund." The Government denied plaintiff's claim for interest on the ground that no claim for refund was ever filed. While this case was pending this court, on February 14, 1927, decided the case of *Magnolia Petroleum Company*, 63 C. Cls. 173, and plaintiff believing that the principal question involved in the decision in that case was applicable to the facts in the instant case filed an amended petition asserting her alternate right to recover interest under the act of 1924, 43 Stat. 346, which allows a recovery of interest on a refund without the filing of a claim. However, on February 20, 1928, the United States Supreme Court reversed the decision of the Court of Claims in the *Magnolia Petroleum Company case*, holding on this point that "statutes are not to be given retroactive effect, or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do

plainly appears." Plaintiff's right to recover, therefore, is confined to the sole question of whether or not plaintiff complied with the provisions of section 1324 (a) of the act of 1921 by presenting a claim for refund. The act provides "that upon the allowance of a claim for the refund of * * * internal-revenue taxes paid, interest shall be allowed and paid * * *." No formal claim for refund was filed in this case. The necessity for a claim for refund, as a condition for the allowance of interest, is not denied. It is plaintiff's contention, however, that certain letters addressed to the Commissioner of Internal Revenue, which will later be discussed, were sufficient to meet the requirements of the statute. The facts briefly stated are as follows: In March, 1919, plaintiff filed her income-tax return, and paid the tax shown to be due thereon. Thereafter the Commissioner of Internal Revenue assessed against plaintiff an additional tax in the amount of $11,308.48, which was paid on April 15, 1921. By letter dated June 22, 1922, the commissioner proposed to assess against plaintiff a further additional income tax in the amount of $14,895.13, and notified plaintiff that she would be allowed twenty days within which to present any protest or objection to the proposed assessment.

Plaintiff immediately filed objections to the proposed assessment, which were overruled by the income-tax unit, whereupon plaintiff filed an appeal to the commissioner under the provisions of section 205 (d) of the revenue act of 1921. This appeal was in the form of a letter, dated August 26, 1922, in which plaintiff made the contention that the estate of her husband, George F. Lasher, of which she was the sole beneficiary, was entitled to the allowance of a deduction from gross income of estate taxes accrued during the year 1918. The error of the commissioner, claimed by plaintiff, in the computation of the tax liability of the estate of George F. Lasher, and the contentions of both plaintiff and the representatives of the Internal Revenue Bureau with respect to the particular question presented by plaintiff, were discussed at length and in minute detail. Appended to this letter was a sworn affidavit of G. H. Shryock, the duly authorized agent and attorney in fact of plaintiff, in which it was stated, "That it is his belief, and he so avers,

that Georgeine S. Lasher, the taxpayer on whose behalf this appeal is made, has paid an aggregate amount of income and surtaxes for 1917, 1918, and 1919 which exceeds the aggregate amount of her actual tax liability for those years." Thereafter negotiations continued by correspondence and by personal conferences between representatives of plaintiff and of the Government, and on July 9, 1923, the commissioner advised plaintiff by letter that a reaudit of her 1918 tax return disclosed an overassessment of $13,252.47, instead of an additional tax as theretofore proposed, stating that the "allowance as a deduction from the estate of George F. Lasher of $65,753.50, Federal estate tax, results in the net income due you from the above-named estate of $22,717.44 instead of $88,470.94."

This determination was in strict accord with plaintiff's contention in the letter of August 26, 1922, except only that plaintiff did not make, and in the nature of the transaction could not at that time have made, a demand for a specific sum. The amount due plaintiff as found by the commissioner was paid on November 23, 1923, without interest. Interest was denied on the ground that the refund was made as a result of an office audit and not on the allowance of a claim for refund. It should be noted, however, that the office audit, which resulted in the establishment of the exact amount due plaintiff, followed the adoption by the commissioner of the contention relied upon by plaintiff in said letter. The initiative in presenting the error of the commissioner, complained of by plaintiff, was taken by the taxpayer and not by the commissioner, and the allowance of the refund was directly due to the action by plaintiff in presenting the question to the commissioner in the letter of August 26, 1922.

Section 1324 of the act of 1921 is a remedial statute, and as such should be liberally construed so as to effectuate its purpose. Official forms for a claim for refund have been provided for use by taxpayers, but the Commissioner of Internal Revenue has not in all instances insisted on the filing of a claim for refund on the official forms. See *Law Opinion* 1116, Internal Revenue Bulletin 111-1, pp. 350-353, wherein the Solicitor of Internal Revenue held that "a claim prepared in any manner, whether on a printed form or not, so

long as it was sworn to and met the other essential requirements of Form 46 and the regulations, would therefore be accepted and considered by the commissioner."

By the letter of August 26, 1922, which contained all the essential information required to be set out in the official forms, plaintiff stated the specific ground upon which she claimed that her taxes for 1918 had been overpaid. Regardless of the form, it was the assertion of a right intelligibly expressed, and it was considered and allowed by the commissioner.

While plaintiff relies in support of her claim for recovery herein on certain other communications subsequent in date to August 26, 1922, it is not deemed necessary to discuss same, as the question involved depends primarily on the proper construction of said letter of August 26, 1922.

It is the opinion of the court that the plaintiff is entitled to recover, and it is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

JAMES A. SACKLEY CO. v. THE UNITED STATES

[No. E-342. Decided April 2, 1928]

On the Proofs

Federal income tax; municipal contractor; exemption from taxation.—A paving contractor, doing work for a municipality under a form of contract generally employed for such work, is not a public instrumentality or city employee, but an independent contractor whose compensation is subject to the Federal income tax, notwithstanding the control and supervision usually exercised in such cases.

The Reporter's statement of the case:

Mr. William M. Williams for the plaintiff. *Mr. Matthias Concannon* and *Williams, Myers, Quiggle & Breeding* were on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The plaintiff is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Illinois, doing business as a paving contractor, and having its principal office in Chicago, Illinois.

II. Both the city of Chicago and the village of Oak Park are municipal corporations in the State of Illinois, existing under the provisions of an act of the general assembly of said State, entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, and the acts amendatory thereof and supplementary thereto.

III. Section 9 of Article IX of the constitution of Illinois, adopted in 1870, authorizes the general assembly of the State to vest the corporate authorities of cities and villages with power to make local improvements by special assessment or special taxation. This authority was exercised by the general assembly of the State by an act entitled "An act concerning local improvements," approved June 14, 1897, in force July 1, 1897, and the amendments thereto, hereinafter referred to as the local improvement act, to be found in Hurd's Revised Statutes, 1919, page 506. The said board of local improvements of the city of Chicago was created under said act, and was charged by it with the duty of originating schemes for all local improvements within the city of Chicago, which are to be paid wholly or in part by special assessment or special taxation of contiguous property or otherwise.

IV. Under an act of the General Assembly of the State of Illinois, approved April 10, 1872, in force July 1, 1872, to be found in Hurd's Revised Statutes, 1919, page 328, the city council of the city of Chicago was authorized to "lay out, to establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same." The power so given to the city council to pave streets and alleys, when all or a portion of the cost thereof is to be paid by special assessment, is exercised in the manner provided in the local improvement act.

V. During the years 1915, 1916, and 1917, plaintiff entered into certain contracts with the city of Chicago, Illinois,

through the board of local improvements of said city, providing for the paving by plaintiff of certain public streets and alleys in that city in consideration of the payment to the plaintiff by the city of Chicago of certain sums of money. One of said contracts entered into September 8, 1917, is attached hereto as Appendix A.

VI. During the year 1916 or 1917, one J. W. Barker entered into two contracts with the village of Oak Park, Illinois, through its board of local improvements, providing for the paving by said J. W. Barker of certain public streets and alleys in the village of Oak Park in consideration of the payment to him by said village of certain sums of money. Said two contracts were assigned by said J. W. Barker to the plaintiff with the consent of the said village and all of the rights and duties thereunder were assumed by the plaintiff, except that said J. W. Barker did part of the grading under one of the contracts.

VII. All of said contracts were according to the same form and contained, among other provisions, detailed specifications as to the material to be used and the work to be performed thereunder. The contract contained, among others, the following provisions:

"Such work to be done under the direction and to the satisfaction of the board of local improvements, and in strict compliance with the terms and conditions of this contract, and with the plans and specifications prepared for making this improvement on file in the office of the board of local improvements of the city of Chicago, the original of which specifications is attached hereto and made a part of this contract.

"The contractor to whom the work is awarded shall furnish all materials, labor, and appurtenances necessary to complete the work in accordance with these specifications, and anything omitted herein that may be reasonably interpreted as necessary to such completion, the board of local improvements being the judge, is to be merged in the price bid for the improvement.

"All the work shall be executed in the best and most workmanlike manner, and no improper materials shall be used, but all materials of every kind shall fully answer the specifications, or, if not particularly specified, shall be suitable for the place where used and satisfactory to the board of local improvements.

"The board of local improvements shall decide all questions relating to measurements, the materials used, the character of the work performed, and as to whether the rate of progress is such as to comply with these specifications.

"The contractor shall notify the board of local improvements forty-eight (48) hours before beginning any work on this contract of his intention to do so, and in case of a temporary suspension of the work he shall give a similar notice before resuming work.

"The board of local improvements shall at all times have access for inspection to all branches of the work on the street, at the refineries, or at the plants where material is stored, prepared, or being mixed; and the contractor shall furnish from time to time such samples of each separate ingredient or ingredients in combination of the materials to be used in the improvements as may be requested by the board of local improvements.

"The work herein specified shall be prosecuted with such force as the board of local improvements may deem adequate to its completion within the time specified. If the rate at which the work is performed is not, in the judgment of the board of local improvements, such as to insure its progress and completion in the time and manner herein specified, or if at any time the contractor refuses or neglects to prosecute the work with a force sufficient, in the opinion of the board of local improvements, for its completion within the specified time, or if, in any event, the contractor fails to proceed with the work in accordance with the requirements and conditions of these specifications, the board of local improvements shall have full right and authority to take the work out of the hands of the contractor and to employ other workmen to complete the unfinished work, or to relet the same to other contractors, and to deduct the expense occasioned by such default from any money that may be due and owing to the contractor.

"The contractor shall perform all of the work herein specified under the direction and superintendence of the board of local improvements and to its entire satisfaction, approval, and acceptance.

"All material to be incorporated in the work, all labor performed, and all appliances, tools, and methods used shall be subject to the inspection and approval or rejection of the board of local improvements."

Specifically the board, acting as such or through its employees, had power among other powers of supervision under the said contracts—

(*a*) To require the contractor to furnish and set cast-iron inlet gratings of the form and dimensions prescribed by the board.

(*b*) To prescribe the radii for circular stones built at intersections and to prescribe the grades and lines therefor.

(*c*) To prescribe the size and shape of barrows or appliances used in measuring the parts of cement, sand, limestone screenings, stone, slag, or gravel.

(*d*) To prescribe the length of time during which the concrete foundation shall lie before being covered with brick.

(*e*) To approve or reject any cement which is not satisfactory to the board.

(*f*) To direct the use of such guides and templets as the engineer may see fit in the work of surfacing the layer of sand upon the concrete foundation.

(*g*) To direct how the gutters shall be constructed, the angle at which the brick shall be laid on intersections and junctions of lateral streets, and to direct the ramming instead of the rolling of the brick in constructing the wearing surface.

(*h*) To prescribe the temperature of the pitch filler used in surfacing.

(*i*) To make any alterations deemed necessary which will increase or diminish the quantity of labor or material or expense of the work.

(*j*) To order the dismissal of any employee of the contractor upon the work who refuses or neglects to obey any of the instructions of the board relating to the carrying out of the provisions and intent of the specifications or who is incompetent, unfaithful, abusive, threatening, or disorderly in his conduct.

(*k*) To grant or withhold permission for the conduct of work at periods other than during the regular working hours.

(*l*) To require that the contractor furnish stakes and assistance necessary to give lines and grades where needed for the work.

VIII. During the year 1917 the plaintiff completed its work of paving the said public streets and alleys in the city of Chicago and in the village of Oak Park, in accordance

with the terms and requirements of said contracts and specifications, and derived therefrom during that year certain compensation (in excess of the cost of performance by it of said contracts), being the amount of $20,200.27, consisting of $18,863.36 from the city of Chicago and $1,336.91 from the village of Oak Park.

IX. The following is the procedure for the making of a local improvement in the city of Chicago, which was followed during the years involved in this action. The board of local improvements first makes a recommendation to the city council of the city of Chicago for the passage by said council of an ordinance directing the improvement. The ordinance directing the making of the local improvement is then made by said city council, which is the corporate authority possessing power of special taxation under section 9 of Article IX of the constitution of Illinois. Proper proceedings are then instituted in the name of the city of Chicago for the confirmation of the special assessment. After final judgment is rendered in the legal proceeding, confirming the special assessment, the said board of local improvements is authorized under the local improvement act to make and enter into contracts for the making of the improvement and to supervise its completion. Section 83 of said act provides in part:

"The board is hereby authorized to make or cause to be made, the written contracts, and receive all bonds authorized by this act, and to do any other act, expressed or implied, that pertains to the execution of the work provided for by such ordinance or ordinances, and shall fix the time for the commencement of the work thereunder and for the completion of the work under all contracts entered into by it, which work shall be prosecuted with diligence thereafter to completion and said board may extend the time so fixed from time to time, as they think best for the public good. The work to be done pursuant to such contracts must, in all cases, be done under the direction and to the satisfaction of the board of local improvements, and all contracts made therefor must contain a provision to that effect, and also express notice that in no case, * * * will said board, or municipality, * * * or any officer thereof, be liable for any portion of the expenses, nor for any delinquency of person or property assessed."

Prior to the letting of the paving contract by the board of local improvements of the city of Chicago, a notice is published in a designated official newspaper that the plans and specifications and other data concerning the proposed improvements are on file at the office of the board for the use and information of interested persons, the same notice fixing a certain subsequent day and hour for the submission of sealed bids by contractors. At the time designated in the notice the bids are opened at a public meeting of the board and the contract is let to the lowest responsible bidder.

X. The general procedure in the execution of the work under the paving contracts entered into by the plaintiff with the city of Chicago, under the local improvement act, which was followed in the performance of the work under the said contracts, is in substance as follows:

The contractor, after signing the contract, applies to the board for permission to proceed with the work, setting out that he has arranged for materials and equipment necessary to do the work. Application is then made to the board for the grades and lines on the improvement, which are established by the engineers of the board. The work then proceeds as follows:

(*a*) The curb and gutter work; (*b*) the sewer work; (*c*) the preparation of the subgrade, either by excavating or filling; (*d*) the rolling or flooding of the subgrade in preparation for the paving base; (*e*) the laying of the paving base; and (*f*) the putting on of the wearing surface.

An inspector who is an employee of the board is continuously present where the work is being conducted. The work is also visited at irregular intervals by the general or traveling inspector, division engineer, and chief engineer of the board, and sometimes one or more members of the board visit the work.

The inspector in some instances gives instructions to the foreman of the contractor, and in some directly to the men themselves.

During the course of construction of the work the inspectors or engineers of the board are constantly directing and supervising the manner of the performance of the work by giving directions which the person doing the work is re-

quired to and does obey, particularly with reference to the following:

(*a*) The lines and grades which are to be followed.

(*b*) Whether contractor can proceed with the work, and whether weather conditions are right to go ahead, and whether the subgrade is too wet to work on.

(*c*) Whether the mixer is satisfactory and the proportioning of the mix that goes into the concrete mixer, and the length of time materials are to be mixed.

(*d*) The size of material, the amount of water that goes into the concrete, and whether the concrete foundation or subgrade should be covered to protect it from frost.

(*e*) When the work must be stopped and resumed on account of weather conditions.

(*f*) The ordering of equipment off the job if deemed unsatisfactory.

(*g*) The stopping of work pending a controversy with the contractor as to any matter involved therein.

(*h*) The requiring of the materials to be heated when deemed necessary.

(*i*) Prescribing temperature of the pitch filler and when the filler shall be poured.

(*j*) Prescribing the size and quality of sand, stone, and gravel used in the work, and also by prescribing additions to or omissions from the work and by directing character of materials to be used.

(*k*) Directing as to when cast-iron inlet gratings shall be furnished and set by the contractor.

(*l*) The radii at which circular stones are to be built at intersections.

(*m*) Prescribing when guides and templets shall be used in surfacing the layer of sand between the paving base and the wearing surface.

(*n*) Prescribing the angle at which brick shall be laid at intersections in constructing the wearing surface.

(*o*) Directing the ramming of the brick instead of rolling them, as provided in the specifications.

(*p*) Directing as to the building of crosswalks at intersections and the amount of sidewalk patching.

(*q*) The ordering out of certain material used in the subgrade and the substitution of other material.

(*r*) Directing as to whether the subgrade shall be rolled or flooded.

XI. Controversies arose at times between the inspector or engineer of the board and the contractor in connection with the progress of the work. Where they can not be settled on the job they are referred to the chief or division engineer of the board or to the board itself, and the decision of said engineer or of the board itself will govern, and was followed.

XII. The powers of the village of Oak Park, of its board of trustees, and of its board of local improvements, during the years here involved, were defined by the same statutory provisions as those of the city of Chicago, and the same procedure was had in the making of a local improvement, as above mentioned, except that as the village of Oak Park is a municipality having a population of less than 100,000 inhabitants. certain details connected with the levying of special assessment, etc., which are not material to this case, were required to be done differently from those required for the city of Chicago. The contracts above mentioned with the village of Oak Park were entered into under the said local improvement act and were performed by the plaintiff in accordance with the terms and specifications thereof in similar manner to those above mentioned performed by plaintiff for the city of Chicago.

XIII. On or about March 1, 1918, the plaintiff filed with the collector of internal revenue at Chicago, Illinois, a return of its income for the year 1917 subject to income and profits taxes under the revenue act of 1917, and thereafter paid to said collector an amount of tax based upon said income. Plaintiff did not include in said return the aforesaid amount of $20,200.27 derived by it as compensation from the city of Chicago and the village of Oak Park.

XIV. The provisions of the contracts under which the plaintiff operated in the instant case are in substance the same as those in the forms which have been used for contracts entered into under the special assessment act of the State of Illinois for a great many years. The interest in or the action by the inspector of the board of local improve-

ments in connection with such contracts has been to see that the specifications of the contracts are fully met. The contract and the specifications, which are part of the contracts, are in form and terms practically the same as those generally used for paving contracts by municipalities throughout the country, and the conditions, control, and provisions imposed upon the contractor herein are generally no more drastic than similar provisions in other paving contracts.

XV. Paving work incident to the repairing, resurfacing, and maintenance of the streets of the city of Chicago, the cost of which has to be paid out of a general tax or the vehicle tax or some special fund, is done under the direction of the department of public works. The work itself is done by a paving organization maintained by the city of Chicago, under the direct supervision of the department of the superintendent of streets, as a subdivision of the department of public works. The department of public works and the board of public improvements of the city of Chicago are entirely separate entities, and the superintendent of streets, as one of the units of the department of public works, has no control over work being done under contracts entered into with the board of local improvements.

XVI. By letter from the Bureau of Internal Revenue, dated October 23, 1922, the plaintiff was notified of a proposed additional assessment against it of income and profits taxes in the amount of $9,041.29 for the year 1917. Said proposed additional assessment was based upon the inclusion in taxable income of the plaintiff for the year 1917 of said amount of $20,200.27 derived by it as compensation from the city of Chicago and the village of Oak Park and certain other adjustments not material to this action. After due proceedings in the Bureau of Internal Revenue the Commissioner of Internal Revenue in or about February, 1923, made an assessment against the plaintiff of said amount of $9,041.29 representing alleged additional income and profits taxes due by it for the year 1917.

XVII. On or about March 15, 1923, the collector of internal revenue at Chicago, Illinois, made demand upon the plaintiff for the payment of said amount of $9,041.29 assessed against it. On April 6, 1923, the plaintiff paid said amount

of $9,041.29 to the said collector under protest and duress in order to avoid distraint of its property.

XVIII. On or about September 20, 1923, plaintiff filed with the collector of internal revenue at Chicago, Illinois, a claim for refund of a portion of said sum of $9,041.29 so paid by it under protest, to wit, $8,517.26, representing the amount that would be refundable to plaintiff if the aforesaid sum of $20,200.27 derived by it as compensation from the city of Chicago and the village of Oak Park should be excluded from the taxable income of the plaintiff for the year 1917. On or about February 9, 1925, the said claim for refund was rejected by the Commissioner of Internal Revenue.

XIX. If the aforesaid amount of $20,200.27 derived by the plaintiff during the year 1917 as compensation from the city of Chicago and the village of Oak Park is excluded from the taxable income of the plaintiff, the amount recoverable by it is $8,517.26, with interest thereon from April 6, 1923.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff during the years 1915, 1916, and 1917 entered into contracts with the city of Chicago, Ill., and the village of Oak Park, Ill., for the paving of certain streets. It did not return as income the amount received as compensation for this work, and the Commissioner of Internal Revenue assessed against plaintiff an additional tax of $8,517.26 for the year 1917 based upon the amount of $20,200.27 received by plaintiff as compensation for the work done. This suit is brought to recover the additional assessment, with interest.

The contracts under which the said work was done were secured by plaintiff as a result of publication of the plans and specifications and the solicitation of sealed bids, contracts being awarded to the lowest bidder. While the contracts imposed certain conditions of control over the contractor, the form was the one which has been used in the State of Illinois for a great many years and does not differ essentially from the forms for paving contracts which are used by municipalities throughout the country. The conditions of control and supervision imposed upon the con-

tractor are no more drastic than are usual in paving contracts.

The plaintiff's contention is that by reason of the conditions of control imposed by these contracts it was in effect an employee of the municipalities, and therefore that the compensation which it received for the work done is exempt from Federal income tax.

We are of opinion that under the facts the plaintiff was not a public instrumentality or an employee of the city of Chicago or the village of Oak Park, but was an independent contractor. We think the case is controlled by *Frank H. Mesce* v. *United States*, No. E–558, 64 C. Cls. 481, decided January 16, 1928, and the authorities therein cited.

The petition should be dismissed, and it is so ordered.

Moss, *Judge;* Booth, *Judge;* and Campbell, *Chief Justice*, concur.

ALDINE CLUB v. THE UNITED STATES

[No. H–216. Decided April 2, 1928]

On the Proofs

Taxes; social, athletic, or sporting club; membership dues.—A club whose only facility afforded its members is that of furnishing a business men's lunch at moderate cost, and whose rooms are not used otherwise for social intercourse, is not a social club within the meaning of the statutes which impose a tax upon the initiation fees and annual dues of a "social, athletic, or sporting club or organization."

The Reporter's statement of the case:

Mr. Benjamin B. Pettus for the plaintiff. *Mr. E. F. Colladay*, and *Colladay, Clifford & Pettus* and *Otterbourg, Steindler & Houston* were on the brief.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Alexander H. McCormick* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation incorporated under the laws of the State of New York in the year 1889, and its member-

ship was composed originally of persons engaged in the printing and publishing trades. In 1899 the Aldine Club was merged with an organization known as the Up Town Association, by an order of the Supreme Court of New York, under the name of Aldine Association. On November 25, 1910, the club resumed its original name of Aldine Club.

II. Under sections 801 of the revenue act of 1921, and 501 of the revenue acts of 1924 and 1926, respectively, plaintiff collected from its various members as taxes amounts equal to ten per cent (10%) of their annual membership dues, and periodically from February 1, 1923, to February 28, 1927, paid the amount so collected, under protest, a total of $11,141.14 to the collectors of internal revenue for the second and third districts of New York. A schedule showing the amount collected from each member and the date of payment to the collector of internal revenue is attached to the petition, marked "Exhibit A," and is made part hereof by reference.

III. On or about December 9, 1926, January 31, March 28, and April 21, 1927, respectively, there were duly filed by plaintiff claims for refund, with interest, of the amount of the taxes so paid. The basis of the claims for refund set forth that plaintiff was not a social, athletic, or sporting club or organization within the meaning of the revenue acts referred to. The said claims were denied by the Commissioner of Internal Revenue prior to the institution of this suit upon the ground that the plaintiff was a social club or organization, and he refused to refund the taxes paid, as aforesaid.

IV. The purpose and only function of the Aldine Club during the years in question has been to furnish to its members a luncheon between the hours of 12 and 3 p. m. on business days only.

V. The Aldine Club occupies as its quarters rooms on the fourteenth floor of an office building known as 200 Fifth Avenue, New York City. It has retained this location since about 1909. Situated in the club are main dining room, ladies' dining room, two small lunch rooms, kitchen, coat room, ladies' wash room, gentlemen's wash room, reading

room, and directors' room. The main dining room seats about 350 people; the ladies' dining room from 50 to 75 people.

VI. The membership of the club is not confined to any class, but is constituted for the most part of merchants whose business is located in the vicinity of the club. As soon as their business locations move, the members usually resign. The present membership of the club is, resident 511, nonresident 81. There are about 90 to 125 resignations per year.

VII. The luncheon furnished to the members of the club on weekdays is provided by a caterer, who pays to the club 5 per cent of the turnover on the restaurant business. Included in his contract the caterer has the right to rent the rooms of the club after 5 p. m., and the club uses the rooms only during the hours 12 to 3 p. m. Three of the club's seven employees are employed only between these hours: A telephone operator from 12.30 to 2, a girl attendant in the ladies' wash room from 12 to 2, and a hall boy from 12 to 3. Its other employees are three boys, who are in the coat room during luncheon and who clean the place before and after, and a bookkeeper. The annual dues for resident members are $60.00, nonresident $25.00. The club has sustained a deficit in each of the years from 1923 to 1927, inclusive. To overcome this continued deficit the club has imposed a cover charge, which has lessened the loss for the fiscal year 1927.

VIII. The clubrooms have not been used for a dance, card party, theatrical performance, tournament, or athletic performance by the club at any time; no entertainments have been given during the period 1923 to 1927, except lectures on instructional topics by distinguished public men, and such lectures have not been given more than two or three times a year during said period. When given, these addresses were made during the regular lunch hour in the main dining room. There are no outdoor entertainments given under the auspices of the club. The club does not maintain a tennis court, golf course, swimming pool, or similar social, athletic, or sporting facilities.

IX. The original Aldine Club, organized in 1889, was formed for the encouragement of literature and art and

social intercourse and enjoyment, and in its time was famous for its dinners for prominent authors and publishers. Subsequent to the amalgamation of the club with the Up Town Association the social features were abandoned and the original membership withdrew, being succeeded by manufacturers and jobbers who had moved into the district and who did not care for social features. Since 1911 or 1912 no dinners or other social features have been given, and since 1920 or 1921 the serving of breakfasts has been discontinued. About the same time the club gave up the large room which had been used for social purposes and sold its library to one of its members. The only facility which the club now affords its members is that of furnishing a business men's lunch at moderate cost.

The court decided that plaintiff was entitled to recover $10,979.14, with interest in the sum of $1,415.65, together aggregating $12,394.79.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

By this suit the Aldine Club seeks to recover taxes paid on membership dues under the revenue acts of 1921, 1924, and 1926, 42 Stat. 291, 43 Stat. 321, 44 Stat. 92. The taxes were paid under protest, and the application duly made to the Commissioner of Internal Revenue for a refund of them was denied. There is no dispute about the facts. The sole question is whether the Aldine Club was a social club, within the meaning of the statutes, for the several years. These are in all material respects the same as section 801 of the revenue act of 1921, reading as follows:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid * * * a tax equivalent to 10 per centum of any amount paid on or after such date, for any period after such date, (a) as dues or membership fees (where the dues or fees of an active resident annual member are in excess of $10 per year) to any social, athletic, or sporting club or organization; * * *."

The duly authorized regulations of the commissioner in article 3 of Regulations 43, part 2, provide, among other

things, that the "purposes and activities of a club and not its name determine its character for the purpose of the tax on dues," and further the regulation admits, practically, that every club does not come within the statute. But article 3 of these regulations furnished a definition of "social clubs," as follows:

"Any organization which maintains quarters, or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a 'social * * * club or organization' within the meaning of the act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, singing society, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but if the social features are a material purpose of the organization, then it is a 'social * * * club or organization' within the meaning of the act. An organization that has for its exclusive or predominant purpose religious or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is so clearly not a 'social * * * club or organization' that its possession and use of a building furnished with social-club facilities does not render taxable dues or fees paid to it. Most fraternal organizations are in effect social clubs, but if they are operating under the lodge-system payments to them are expressly exempt."

Accepting the regulations as embodying the construction of the taxing act given by the Treasury Department, it appears that not its name and inferentially not its charter declarations but its "purposes and activities" determine its character for taxation purposes. And though there may be social features incident to its general activities, yet if the social feature is a subordinate and merely incidental feature to the "predominant" purpose of the organization, it is not a social club. This must be true unless all clubs where people congregate are social clubs, "because practically all clubs may be said to have a feature of the social, using the term as having to do with human intercourse." *Chemists' Club*,

decided June 6, 1927, 64 C. Cls. 156. The Aldine Club was organized under the laws of New York in 1889. About ten years thereafter it was merged with an organization known as the Up Town Association under the name of Aldine Association. In November, 1910, it resumed its original name of Aldine Club.

The findings show that the purpose and only function of this club during the years in question has been to furnish to its members a luncheon between stated hours on business days only, and at a moderate cost. It does not furnish breakfasts. The luncheon is provided by a caterer who pays to the club 5 per cent of the turnover on the restaurant business. The club uses the rooms only during the hours 12 m. to 3 p. m. The caterer has the right to rent the rooms after 5 p. m. It occupies its quarters, rooms on the fourteenth floor of an office building known as 200 Fifth Avenue. These have never been used for a dance, card party, or theatrical performance. During the period 1923 to 1927 some entertainments have been given in the form of lectures on instructional topics by public men, made during the lunch hour in the main dining room three or four times a year. Manifestly the predominant purpose of this organization is not the cultivation of companionable relations. It furnishes a convenient place where business men may get their luncheons. The facilities provided were adapted to that purpose. Its social features were incidental, and remotely so, to its general or "predominant purpose." Its brief characterizes it as "an exalted lunch room which a certain number of individuals maintain because it is in a convenient neighborhood." The facts sustain this description. We think it is not a social club within the purview of the statutes and regulations. See *City Club of St. Louis* v. *United States*, decided January 3. 1928, 24 Fed. (2d) 743; *Chemists' Club*, *supra*. The plaintiff should have judgment. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

CLAUDE J. TIGNOR v. THE UNITED STATES

[No. F-165. Decided April 2, 1928]

On the Proofs

Eminent domain; just compensation; taking of oyster beds.—Just compensation in the amount of the fair market value, together with interest, allowed by the court for the taking, under the act of July 1, 1918, and the proclamation of the President made pursuant thereto, of plaintiff's leasehold interest in oyster lands, oysters on the land, and personal property.

The Reporter's statement of the case:

Mr. Allan D. Jones for the plaintiff. *Mr. W. E. Hogg* was on the brief.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a citizen of the United States, residing at Yorktown, Va., and has at all times borne true and loyal allegiance to the Government of the United States.

II. Prior to September 7, 1918, plaintiff was the owner of a lease from the State of Virginia of 98.7 acres of oyster-planting ground located in York River, York County, Virginia. This lease bore date of November 20, 1913, and ran for 20 years from date, at the expiration thereof the lessee having prior right over all other applicators to have the same ground reassigned to him. The said lessee had, prior to 1913, been the holder of the said leasehold through assignment to him on November 26, 1909, by the executrix under the will of the prior owner, then deceased. On said oyster land the plaintiff had deposited oyster shells and had planted oysters.

On the upland adjoining this oyster ground the plaintiff had erected a small watch house containing a few articles of furniture and equipment incident to the enterprise. Drawn alongside of said house were 4 boats which plaintiff used in season for the carrying on of the the oyster business. Title to the land on which reposed the said house, furniture, equipment, and boats did not lie in the plaintiff.

III. Pursuant to an act of Congress of July 1, 1918, 40 Stat. 738, the President of the United States on August 7, 1918, issued a proclamation declaring that he took "title to and authorized the Secretary of the Navy to take possession of" a certain tract of land near Yorktown, Va., for the purpose of a naval mine depot. This tract was described with particularity, and the easterly boundary thereof was given as the westerly low-water line of the York River. To this particular description was added the following: "Together with all riparian rights, privileges, easements, and other rights whatsoever, appurtenant or appertaining in any way to said above-described tract of land and all privately owned rights in the waters lying between the low-water line of said tract and the bulkhead or pierhead line in the York River as such line or lines may be hereafter established." The plaintiff's leasehold lay between the said low-water line and the said bulkhead or pierhead line in said York River as thereafter established. The proclamation also contained the following:

"The several tracts of land above described, together with all improvements thereon and all rights and privileges appurtenant or appertaining in any way thereto, are hereby declared to be and the same are set apart for use for naval purposes and are placed under the exclusive control of the Secretary of the Navy, who is authorized and directed to take immediate possession thereof in accordance with the terms of said act on behalf of the United States, for the purposes aforesaid.

"The title to the several tracts of land above described shall be deemed to be vested in the United States from and as of the date that actual possession thereof is taken by the Secretary of the Navy.

"The Secretary of the Navy is authorized and directed to take such steps as may in his judgment be necessary for the purpose of conducting negotiations with the owners of property or rights whatsoever therein within the said above-described tracts of land for the purpose of ascertaining the just compensation to which said owners are entitled in order that compensation therefor may be made in accordance with the provisions of the act aforesaid. All owners of land and improvements, title and possession of which are taken hereunder in accordance with the terms of the act hereunder, and all persons having claims or liens in respect thereto are hereby notified to appear before the board to be appointed

by the Secretary of the Navy and present their claims for compensation for consideration by the said board in accordance with the provisions of the act aforesaid.

"All persons residing within said above-described tracts of land or owning movable property situate thereon are hereby notified to vacate the said tracts of land and to remove therefrom all movable property within thirty (30) days from the date of this proclamation. Provided, however, that the Secretary of the Navy may in his discretion, and where such action will not interfere with the public interests, extend said period of thirty (30) days for such further period as he may deem appropriate."

IV. On September 7, 1918, and during the plaintiff's absence from the grounds in question, duly authorized agents of the defendant entered thereupon, took possession of the upland contiguous thereto, the watch house and its furniture, boats, and other equipment incident to the business. They further took possession of plaintiff's leasehold and proceeded to erect a pier thereover, extending approximately 600 feet into the water, for the purpose of unloading and transferring explosives and mines from boats to the shore. Thereafter boats carrying explosives and mines docked at the said pier, and the cargo was transferred to the shore. The said pier was of temporary construction, was later abandoned for a more permanent structure erected downstream from plaintiff's leasehold, and has now fallen into disuse and rotted away.

V. The defendant made use of the York River at this point and above and below the same during this period for a safe anchorage for the fleet, the vessels lying beyond the outermost line of plaintiff's land. Nets were stretched across the river at various points, protecting the fleet from enemy action and hindering navigation up and down the river to all except authorized vessels. Strict watch was kept along the shore line for any possible action detrimental to the safety of the fleet and the mine depot.

The building of the pier and the use of the waters adjacent thereto, together with acts of depredation, destroyed the value of the oyster bed.

VI. Pursuant to the provisions of the statute and the proclamation the plaintiff filed his claim for just compensa-

tion before the "Board of Valuation of Commandeered Property of the Navy Department," which held hearings for that purpose at Williamsburg, Virginia. This board ordered an award of $500, with which the plaintiff was not satisfied. On November 6, 1924, the plaintiff issued his receipt for $375, being three-fourths of the award, reserving his right to sue for the balance of what he claimed to be just compensation.

VII. The fair market value of plaintiff's property taken by the Government, as of September 7, 1918, is as follows:

The leasehold interest in the oyster lands, excluding the planted oysters but including the shell deposit	$7, 500
The watch house, furniture, boats, and equipment, classified together	500
(The evidence does not indicate the separate values of the articles taken.)	
Oysters on the land	7, 000
Total	15, 000

The court decided that plaintiff was entitled to recover $14,625, with interest from September 7, 1918, until paid.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, Claude J. Tignor, was the lessee of 98.7 acres of submerged land in the York River, York County, Virginia, which he had leased under the laws of Virginia for the culture of oysters.

Pursuant to an act of Congress of July 1, 1918, 40 Stat. 738, the President of the United States, on August 7, 1918, by proclamation, took "title to and authorized the Secretary of the Navy to take possession of" a certain large tract of land near Yorktown, Va., for the purpose of a naval mine depot. Plaintiff's leasehold was included in the boundary of said tract. Said proclamation conferred upon the Secretary of the Navy the authority and directed him to take such steps as in his judgment might appear necessary to ascertain just compensation to which the several owners of property taken might be entitled in order that compensation therefor might be made. All owners of land or other property taken were notified to appear before the Board of Valuation of

Opinion of the Court

Commandeered Property of the Navy Department and present their claims for compensation. Plaintiff was awarded the sum of $500. Being dissatisfied with said award, plaintiff on October 6, 1924, accepted the sum of $375, three-fourths of the award, and this suit is for the recovery of the remainder of what plaintiff claims as just compensation.

In addition to the leasehold in question, plaintiff owned a small watch house built on the land of another, which contained certain articles of furniture and equipment used in his oyster business, together with four boats which were left at or near said watch house.

The Government took complete and exclusive possession, use, occupancy, and control of all said property on September 7, 1918.

Defendant denies the right of plaintiff to recover in any sum, under the authority of the case of *Bailey and Fulgham* v. *United States*, 62 C. Cls. 77. In the *Bailey case* the *low-water mark* was the eastern boundary of the land taken, and plaintiff's lease was outside and beyond said boundary. In the construction of a bulkhead or pierhead, in aid of navigation, plaintiff's leasehold was invaded and damaged. The court held that no officer of the Government had authority to take and pay for property beyond the prescribed limits in a taking for the improvement of navigation. In the present case there was included in the particular description of the property embraced in the proclamation the following recital: "Together with all riparian rights, privileges, easements, and other rights whatsoever appurtenant or appertaining in any way to said above-described tract of land, and all privately owned rights in the waters lying between the low-water line of said tract and the bulkhead or pierhead line in the York River as such line or lines may be hereafter established." Plaintiff's leasehold was situated *between the said low-water line and the bulkhead or pierhead line as thereafter established.*

Said proclamation contained the further provision:

"The several tracts of land above described, together with all improvements thereon and all rights and privileges appurtenant or appertaining in any way thereto, are hereby declared to be and the same are set apart for use for naval

purposes and are placed under the exclusive control of the Secretary of the Navy, who is authorized and directed to take immediate possession thereof in accordance with the terms of said act on behalf of the United States, for the purposes aforesaid.

"The title to the several tracts of land above described shall be deemed to be vested in the United States from and as of the date that actual possession thereof is taken by the Secretary of the Navy."

The sole question in this case is the fair value of plaintiff's property as of September 7, 1918.

It is shown in the evidence that with the exception of a few acres the whole of plaintiff's acreage was under cultivation for oysters and was well provided with shell beds, which add substantially to the value of oyster lands. In addition to the shell already on the ground when plaintiff acquired his lease, plaintiff had planted thereon 80,000 bushels of shells. In the years from 1913 to and including 1917 plaintiff planted 30,000 bushels of seed oysters. It requires about three years to mature oysters, and one bushel of seed oysters will produce more than two bushels of marketable oysters. The market price for oysters ranged from 45¢ to 55¢ per bushel for small oysters and from 75¢ to $1.00 for large oysters. Selected oysters sold for $6.00 a barrel of two bushels. From his first planting plaintiff sold 18,000 bushels, and did not exhaust the supply of marketable oysters on the land at that time. In 1917 and 1918 most of plaintiff's oysters were small and not quite ready for the market. Plaintiff's land had a considerable value without planted oysters, for the reason that the oyster "spat," as it is called, would "strike" on the shells, and marketable oysters would be produced by a natural process, thus obviating the expense of planting said oysters. It also had a value without either planted oysters or planted shells as shown by the evidence. The lease extended for a period of twenty years from its date, November 29, 1913, with the privilege of renewal.

The measure of recovery in this case is the value of the leasehold interest in and to the 98.7 acres of oyster land held by plaintiff under the lease from the State of Virginia, together with the value of the oysters located upon said lands

at the time of the taking, plus the value of the personal property taken. See *Bailey case, supra.*

Plaintiff claimed, and the commissioner allowed, $500 as the value of the personal property taken, $7,500 as the value of the leasehold, and $30,000 as the value of the oysters on the land at the time of the taking, making a total of $38,000.

The court has determined the value of the leasehold interest and of the personal property at $7,500 and $500, respectively, as found by the commissioner. In the question of the value of the oysters located on the lands at the time of the taking, giving due consideration to the speculative element necessarily involved in that character of claim, the court has reached the conclusion that the sum of $7,000 represents the fair value of said oysters.

Plaintiff is entitled to recover, and it is so ordered.

Graham, *Judge;* Booth, *Judge;* and Campbell, *Chief Justice*, concur.

NEVADA COUNTY NARROW GAUGE RAILROAD CO. v. THE UNITED STATES

[No. F-222. Decided April 2, 1928]

On the Proofs

Mail pay; jurisdiction; determination by Interstate Commerce Commission; refusal of Government to pay; remedy.—See *New York Central R. R. Co.* v. *United States, ante*, p. 115.

Same; authority of Interstate Commerce Commission to determine past compensation; allowance of interest.—*Id.*

The Reporter's statement of the case:

Mr. Ben B. Cain for the plaintiff. *Messrs. Clarence M. Oddie* and *Ben B. Cain, jr.*, were on the brief.

Messrs. Lisle A. Smith and *Joseph Stewart*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation duly incorporated under the laws of the State of California and is a railway common

carrier engaged in transportation of intrastate and interstate commerce by railroad, and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States.

II. Pursuant to authority of section 5 of the act of July 28, 1916, 39 Stat. 412, 427, making appropriations for the service of the Post Office Department for the fiscal year ended June 30, 1917, and for other purposes, the United States, through the Postmaster General, has since March 1, 1920, when the service was placed on the space basis thereunder, including the period between July 1, 1921, and January 22, 1925, required the plaintiff to transport, and the plaintiff has transported, the United States mails on its railroad lines in the State of California under the conditions and with the service prescribed by the Postmaster General.

III. Acting under the authority and requirements of said act of Congress the Interstate Commerce Commission by an order dated December 23, 1919, a copy of which marked Exhibit A is attached to the petition in this case and made a part hereof by reference, established the fair and reasonable rates of payment for transportation of mail matter by railroads subject to the act until further order or orders of the commission, including the plaintiff herein.

IV. The plaintiff, with other railroad common carriers, filed with the Interstate Commerce Commission on June 30, 1921, an application for a reexamination of the facts and circumstances surrounding the transportation of the mails upon its line and the service performed by it in connection therewith as provided for further proceedings under said act and with special reference to the period since March 1, 1920, and prayed the commission by order to determine the fair and reasonable rates during said period and for the future and to order such readjustment of compensation for service rendered from March 1, 1920, to the date of its order.

V. The Postmaster General filed his answer to the application of the railroads specifically objecting to a reexamination with reference to the period since March 1, 1920, and to the request for an order fixing rates of pay during said period and directing a readjustment of compensation for

service rendered from March 1, 1920, to the date of an order to be made therein on the ground that such finding and order would be retroactive and in contravention of the rights of the Government under rates theretofore fixed by the commission for service required by the Postmaster General, performed by the carriers and fully paid for by the Postmaster General, and unauthorized by law.

VI. Thereafter, the commission by order of August 1, 1921, reciting the provisions of the act, *supra*, providing that after the lapse of six months from the entry of an order the Postmaster General or any carrier may apply for a reexamination and that the plaintiff, the Nevada County Narrow Gauge R. R. Co., among others, had filed application for a reexamination of the facts and circumstances surrounding the transportation of United States mails upon their lines and the services performed by them in connection therewith with special reference to the period since March 1, 1920, ordered that the proceedings be reopened for reexamination and such further hearing as the commission might direct with respect only to the facts and circumstances surrounding the transportation of the mail and the services connected therewith upon the lines of the applicants.

VII. In the proceedings had thereunder new and additional evidence and testimony different from that submitted in the original case on which the commission's order of December 23, 1919, was based, was submitted by all parties interested, based on reports of actual operation for the month of September, 1921, selected as a representative period, supplemented by other evidence.

VIII. Following the hearings instituted by the Interstate Commerce Commission on the application of the New England railroad mail carriers, in which the plaintiff did not join, the commission made a report on December 13, 1923, reciting, *inter alia*, "It is our opinion that in a proceeding upon application for a reexamination under the act of July 28, 1916, we have authority to establish rates only for the future and not for the past. The carriers' request for findings as to the past is therefore denied." The commission issued an order establishing rates on and after December 13, 1923, but made no order as to the period prior to that date.

IX. Following the hearings so instituted by the Interstate Commerce Commission on said application of the plaintiff herein and others, the commission made a report on January 22, 1925, containing its finding of facts and conclusions thereon as a basis for an order stating, *inter alia*, "We are of the opinion and find that the rates of mail pay received by the applicant carriers for transportation of the mails on and after June 30, 1921, were not fair and reasonable, and that the fair and reasonable rates of pay to have applied for such service from said date were the rates herein established as the fair and reasonable rates of pay for the future." This was a mere finding and did not purport to fix the rate stated in its order as for the future as applying to the period prior to January 22, 1925, the date of said order. Based upon said report the commission issued an order citing previous orders, the application of the railroads for a reexamination as provided by law, the reopening of the proceedings for reexamination with respect only to the facts and circumstances surrounding transportation of the mails and the services connected therewith upon the lines of the applicants, and by order, copy of which is attached to plaintiff's petition as Exhibit B, established as fair and reasonable rates to be received by the roads, including plaintiff, on and after January 22, 1925, a schedule of rates therein set forth. Thereafter, March 17, 1925, the Postmaster General filed his petition for a rehearing and a revision of the finding with respect to the period on and after June 30, 1921, and prior to the date of the commission's order of January 22, 1925, on the ground that the commission had no jurisdiction to make the same.

X. On March 21, 1925, the attorney for plaintiff herein made demand upon the Postmaster General for the application of the new rates to the service performed from and after June 25, 1921, to which the Postmaster General replied that the rates fixed by the commission's prior order were controlling upon the department, and that under the circumstances the department could not take any action towards recognizing any other rate than that which the Postmaster General is required to pay.

XI. On July 29, 1925, plaintiff herein, together with other railroads concerned in the orders, made application to the commission to issue an order fixing and determining the rates for transportation of the mail by said carriers as of June 30, 1921, to January 22, 1925, the rates found for said period in the commission's order of January 22, 1925. To this application the Postmaster General filed his reply, restating his position taken in his reply filed July 19, 1921.

XII. The Interstate Commerce Commission made a report on December 8, 1925, affirming its previous findings as to rates, and issued an order that the rates established in its order of January 22, 1925, as the rates of pay to be received for the transportation of mail matter by the carrier named in that order, be established as the fair and reasonable rates for the plaintiff herein for the period from June 30, 1921, to January 22, 1925, copy of which, marked "Exhibit C," is attached to plaintiff's petition in this case and made a part hereof by reference.

On December 29, 1925, the attorneys for plaintiff and other carriers renewed their application to the Postmaster General for payment of the increased rates of mail pay between the dates of June 30, 1921, and January 22, 1925, in accordance with the commission's order, to which the Postmaster General replied informing them that he had no authority of law to pay the same.

XIII. On March 17, 1926, the Postmaster General made application to the Interstate Commerce Commission for a reconsideration of the decision by which it had established rates for the period from the date of the filing of the petition of the applicant carrier to the date of the order determining the rates for the future and accompanied said petition with a copy of the opinion of the Comptroller General of the United States, which application the commission denied.

XIV. For the period between June 30, 1921, and January 22, 1925, plaintiff received from the United States for transporting the mails on its railroad, the sum of $8,977.10. The amount which would have accrued under the order of the Interstate Commerce Commission, dated December 8, 1925, if valid, would be $17,954.20, which leaves a balance, which is the subject of plaintiff's claim, of $8,977.10.

The court decided that plaintiff was entitled to recover $8,977.10.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This case was heard with that of the *New York Central Railroad Company, lessee*, No. F–339, decided this day (*ante*, p. 115), and the questions in the two cases are alike. We hold in this case: (1) That this court has jurisdiction because the asserted claim is founded on a law of Congress; (2) that the order of the Interstate Commerce Commission, objected to by the defendant, was a valid exercise of the commission's authority under the act of July 28, 1916, 39 Stat. 412, and (3) that the plaintiff is entitled to judgment for the balance due for the period in question, but interest is not allowable. The opinion in the case above mentioned is applicable to this case. Judgment is accordingly awarded.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.

MARY L. HOWARD, ADMINISTRATRIX OF THE ESTATE OF ELMER ADDISON HOWARD, DECEASED, v. THE UNITED STATES

[No. F–177. Decided April 2, 1928]

On the Proofs

Internal revenue; estate tax; conveyance in contemplation of death.—See *Meyer* v. *United States*, 60 C. Cls. 474.

The Reporter's statement of the case:

Mr. William M. Williams for the plaintiff. *Williams, Myers, Quiggle & Breeding* were on the brief.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Elmer Addison Howard died intestate on May 4, 1921, and at the time of his death was a citizen of the United States and a resident of Chicago, State of Illinois. Letters

of administration were issued to his wife, Mary L. Howard, on May 27, 1921, and she has since that time and is now administratrix of his estate.

II. On May 4, 1924, the said Mary L. Howard, as administratrix of the estate of Elmer Addison Howard, filed with the collector of internal revenue at Chicago, Ill., a return of said estate on Form 706 for the purposes of the Federal estate tax imposed by Title IV of the revenue act of 1918. Said return showed a gross estate in the amount of $565,-579.17, a net estate subject to the estate tax of $415,524.50, and a liability to said estate tax of $12,120.98, which latter amount was paid by said administratrix to the collector of internal revenue at Chicago at the time of filing the return.

III. On July 11, 1923, the Commissioner of Internal Revenue, by letter addressed to Mary L. Howard, administratrix of the estate of Elmer Addison Howard, and signed by R. M. Estes, deputy commissioner, advised the said administratrix that a review and audit of the return filed on Form 706 for the said estate and of the report of investigation disclosed a total gross estate of $780,287.67, a net estate subject to tax of $626,869.14, and a total estate tax liability of $24,112.15. The said gross and net estate as determined by the Commissioner of Internal Revenue included an amount of $134,000.00, representing the value of certain property transferred by said Elmer Addison Howard during his lifetime to his wife, Mary L. Howard, as hereinafter mentioned. Thereupon the Commissioner of Internal Revenue made an additional assessment of estate tax against the estate of Elmer Addison Howard in the sum of $11,-991.17 after crediting against the total alleged tax liability of $24,112.15 the amount of $12,120.98 paid by the administratrix at the time of filing the return. A demand was thereupon, on July 17, 1923, made on the said administratrix by the collector of internal revenue at Chicago, Ill., for the payment of the said additional tax of $11,991.17.

IV. On August 16, 1923, the said administratrix paid under protest to the said collector of internal revenue the amount demanded, to wit, $11,991.17, and on the same day the said administratrix filed with the collector of internal revenue a claim for the refund of so much of the additional

tax of $11,991.17, to wit, $8,038.20, as was based on the inclusion in the taxable net estate of the decedent of the said amount of $134,000.00, representing transfers of personal property made by the decedent in his lifetime.

V. On December 28, 1923, the said claim for refund was rejected in full by the Commissioner of Internal Revenue and the said estate was notified of said rejection by letter, bearing date of December 28, 1923, and signed by C. R. Nash, Deputy Commissioner of Internal Revenue.

VI. No part of said sum of $8,038.20 has been repaid or refunded to the plaintiff, and the defendant has refused and continues to refuse to repay the same or any part thereof.

VII. The Commissioner of Internal Revenue included in the taxable gross and net estate of the said Elmer Addison Howard, deceased, the value at the time of his death of the following property which was transferred by the decedent in his lifetime to his wife, Mary L. Howard:

(a) Stock in the Federal Sand & Gravel Company of the par value of $47,500.00 in 1919 or the spring of 1920, and correctly valued by the Commissioner of Internal Revenue at $47,500.00.

(b) Three hundred shares of stock of the Petroleum Exploration Corporation, in September or October, 1920, and correctly valued by the Commissioner of Internal Revenue at $7,500.00.

(c) Six per cent gold bonds of the Illinois Stone Company of the par value of $79,000.00 in October or early November, 1920, and correctly valued by the Commissioner of Internal Revenue at $79,000.00.

VIII. Mr. Howard at the time of his death was 63 years of age. In 1911 or 1912 he had a successful operation for appendicitis and a complete recovery. At the time of the operation his general health was good. An analysis at that time discloses the presence of albumen in his urine. He had absolutely nothing in the nature of casts or signs of inflammation of the kidneys, and the physician concluded that the presence of albumen was caused by "cyclic albuminuria" and that Mr. Howard did not have any actual kidney disease. This physician was Mr. Howard's only physician from that time until the latter part of December, 1920, or

the early part of January, 1921. During the period from the time of Mr. Howard's recovery from the operation to November 18, 1920, Mr. Howard visited his physician's office eight or nine times for treatment for such minor ailments as colds and diarrhea and observation and general advice.

IX. Mr. Howard was in his usual health from the time of his recovery from the operation for appendicitis up until about the latter part of December, 1920, except for a bronchial trouble which was brought on by the excessive smoking of cigars and which sometimes caused him to cough and be restless at night. On account of this cough he called in his physician about November 1, 1920. His physician told him that he should get rid of the cough and suggested that, since he deserved a vacation anyway, he might take a trip to California. During all the years subsequent to his recovery from the operation in 1911 or 1912 up until a minute or so before his train left for California on the 18th day of November, 1920, Mr. Howard very actively and constantly discharged the duties of his business and at all times was of a happy and cheerful disposition, thoroughly enjoying his business and social contacts and working long hours. Never by any act or word did he indicate in the least that he had any idea of dying. He weighed approximately 195 pounds, was very athletically built, was more than six feet tall, and did not carry any excess weight for a man of his build and height. He believed that he was in most magnificent health. He was "meticulous" in the breach of instructions and thought that doctors were "bunk."

X. While in California Mr. Howard's health was fine for a month or six weeks, when he contracted a severe cold and was compelled to go to bed. At that time the days in California were warm, except that from about four o'clock to six o'clock in the afternoon a cold, stiff breeze came from the Pacific Ocean. A California physician was called in and he diagnosed Mr. Howard's trouble as a "cold" and treated him for a cold. It lasted for several weeks, when Mr. Howard was active again. Then he became sick. This sickness was attended by a certain swelling in his legs. His condition from then on until he returned to Chicago in April,

1921, did not improve. He had been in Chicago for several weeks on his return from California when he died of "nephritis."

XI. Mr. Howard left Chicago on his trip to California on November 18, 1920. Just prior to going away he talked in detail with Mr. Klotz, who had been associated with him in several business matters, about enlarging these enterprises. The plan was to consolidate several properties, the negotiations for which would take six months or longer; and he planned other matters which would require his personal attention in the future.

XII. Prior to making the transfers in question, there were discussions in the family, in which Mr. and Mrs. Howard participated, concerning Mr. Howard's giving these stocks and bonds to Mrs. Howard, in order that she might have some independent income of her own to do with as she might wish, and Mr. Howard made statements to that effect. After the transfers Mr. Howard never exercised any direction or control over either the stock or bonds.

XIII. In 1911 or thereabouts Mrs. Howard received from the estate of her father $8,000.00, which she turned over to Mr. Howard, and which was used by him in his various business enterprises. In 1913 Mrs. Howard owned the residence at Fairfield, Iowa, where the family lived. She transferred that property in 1917 to a man by the name of McLain, who took it as part payment on the purchase price of a farm located in Jefferson County, Iowa, which he sold to Mr. Howard. This residence property was turned in at a cash value of $7,500.00. The title to the farm was taken by Mr. Howard. It was owned by Mr. Howard at the time of his death and was listed in the inventory of his assets. In the spring of 1919 Mr. Howard transferred to Mrs. Howard the above-mentioned $47,500.00 par value of stock of the Federal Sand & Gravel Company in part compensation to her for the $8,000.00 which she had received from her father's estate and as the purchase price of the above-mentioned residence in Fairfield, Iowa, which had been applied on account of the purchase price of the above-mentioned farm.

The Federal Sand & Gravel Company was liquidated in 1920. The proceeds were paid to the stockholders, and Mrs.

Howard received for her stock her proportionate part, represented by $47,500.00 par value.

XIV. Mr. Howard was interested with Charles A. Klotz in the sand and gravel business, as well as several other enterprises, and had been associated with him for about twelve years. They played golf together; he visited in his home socially and probably saw him more than two or three times a week. Sometimes he would see him every day at his office. Mr. Klotz and Mr. Howard were equally interested in the Federal Sand & Gravel Company. Mr. Howard had talked with Mr. Klotz about a gift which he was making to his wife of a certain amount of stock—some of the Federal Sand & Gravel Company stock. He and Mr. Klotz had some prospective sales in mind which would materially increase their income tax. Mr. Klotz said to Mr. Howard, in substance, that he was really working for his family and he was going to make a gift of some of this stock to them, and Mr. Howard replied that he thought Klotz's position was right and that he was going to do the same thing. In a later discussion Mr. Howard told Mr. Klotz that he had transferred $47,500.00 of the Federal Sand & Gravel Company stock to Mrs. Howard. At the time of these discussions nothing was said with reference to any thought on the part of Mr. Howard of dying.

Mr. Howard also had a talk with Mr. Klotz about making a gift to his wife of $79,000.00 of bonds of the Illinois Stone Company. Mr. Klotz was president of that company. Mr. Howard was a stockholder and also owned a block of bonds in that company. This conversation occurred in the latter part of 1919 or the early part of 1920. Mr. Howard told Mr. Klotz that he was going to turn these bonds over to his wife on account of the income tax for the same purpose that he gave her the Federal Sand & Gravel Company stock. Mr. Howard and Mr. Klotz discussed among themselves as to how they could make distributions among their families so as to avoid paying such a big income tax—Mr. Klotz stating that he (Klotz) might as well let them have it at that time as at any other time. Mr. Howard said that he thought Mr. Klotz was right and that he would do the same thing.

The court decided that plaintiff was entitled to recover $8,038.20, with interest from August 16, 1923, to date of judgment.

MEMORANDUM BY THE COURT

The court in the case of *Meyer* v. *United States*, 60 C. Cls. 474, discussed the issues involved in this case. We think the decision there is applicable to the present controversy.

Judgment will be awarded the plaintiff. It is so ordered.

THRIFT BUILDING CO v. THE UNITED STATES

[No. E-123. Decided April 2, 1928]

On the Proofs

Eminent domain; just compensation; refusal to accept 75% of award; interest.—Where the statute provides that one whose lands have been taken by the Government may accept a certain percentage of the amount determined by the President to be just compensation, and sue for such additional amount as will make up just compensation, and such person refuses to accept any of the amount so determined, he is not entitled, in a judgment for just compensation, to interest on the percentage which he could have accepted.

The Reporter's statement of the case:

Millan & Smith for the plaintiff.

Mr. W. F. Norris, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation incorporated under the laws of the State of South Dakota and does business in the city of Washington, District of Columbia.

II. On or before the 24th day of September, 1918, the plaintiff was the sole owner of a certain piece of real estate situate in the District of Columbia, known and described as original lot 2, in square 1098, on Massachusetts Avenue Southeast, with a frontage of 96 feet and 3 inches, and contains 13,530.2 square feet of ground, subject to a deed

of trust dated July 20, 1899, and recorded among the land records of the District of Columbia on July 21, 1899, in liber 2420, folio 143, to secure Thomas W. Smith the sum of $1,800. Thomas W. Smith is dead, and the Washington Loan and Trust Company, a corporation doing business in the city of Washington, District of Columbia, is the trustee by virtue of his last will and testament, duly probated in the Supreme Court of the said District of Columbia. The Washington Loan and Trust Company is the holder and owner of the debt secured, which has been reduced to the sum of $1,400 principal by reason of payments thereon, and consents to the filing of this suit in the name of the plaintiff, and for the purpose of this suit waives its interest, it and the plaintiff having agreed upon a method of adjustment of the proceeds of judgment, as appears by its consent recorded at the end of the petition, which is made a part of this finding by reference.

III. On June 18, 1918, the President of the United States issued an Executive order as follows:

"By virtue of the authority vested in me by the first section of the act of Congress entitled 'An act authorizing the President to coordinate or consolidate executive bureaus, agencies, and offices, and for other purposes in the interest of economy and the more efficient concentration of the Government,' approved May 20, 1918, and by the other acts of Congress hereinafter mentioned, I hereby direct that the Secertary of Labor shall have and exercise all power and authority vested in me by the act of Congress entitled 'An act to authorize the President to provide housing for war needs,' approved May 16, 1918, and by the act of Congress entitled 'An act making appropriations to supply additional urgent deficiencies in appropriations for the fiscal year ending June thirtieth, nineteen hundred and eighteen, on account of war expenses and for other purposes,' approved June 4, 1918, in so far as the same relates to 'housing for war needs.' "

IV. On September 25, 1918, pursuant to the authorization contained in the act of Congress approved May 16, 1918, 40 Stat. 551, and said Executive order of June 18, 1918, the United States requisitioned the land owned by the plaintiff effective as of noon on said day, and the Secretary of Labor appointed James J. Owens requisition officer and

authorized him to take possession of said land on behalf of the United States, and in pursuance of said statute and said Executive order the land was duly requisitioned by the United States as of the 25th day of September, 1918.

V. The President of the United States, acting through the Secretary of Labor, on March 1, 1919, determined the just compensation for such real estate to be $1,218.00, which amount was unsatisfactory to the owner and was declined, and no compensation has been received by the plaintiff for the said real estate. The value of the said real estate when requisitioned was $1,691.27.

The court decided that plaintiff was entitled to recover.

MEMORANDUM BY THE COURT

Just compensation in the amount of $1,691.27 has been awarded plaintiff for the land taken under the act of May 16, 1918, 40 Stat. 551, and the Executive order of June 18, 1918. On March 1, 1919, the President of the United States, acting through the Secretary of Labor, determined that the fair and reasonable market value of the land taken was $1,218, which amount plaintiff declined to accept. Under the provisions of the statute cited plaintiff could have accepted 75 per centum of the amount offered, approximately $900.00, with the right to sue the United States, under said act, for the recovery of such additional sum as added to such 75 per centum might be found to be just compensation for the land taken. This the plaintiff failed to do. This court is without authority to allow interest on 75 per centum of the award from the date of the award, March 1, 1919, to the date of judgment. In *Luckenbach Steamship Company* v. *United States*, 272 U. S. 533, 542, it is said:

"We think such postponement as has occurred in the actual payment of the compensation is attributable entirely to claimant, and therefore that an allowance of interest to the time of payment is not in this case made essential * * *."

Interest has been allowed on the amount determined as just compensation, $1,691.27, from the date of taking, September 25, 1918, to March 1, 1919 (date of award), and thereafter on $777.77 to the date of judgment, the latter amount

representing the difference between the just compensation, $1,691.27, and 75 per centum of the original offer, $913.50, on which, as already stated, interest is not allowable.

Judgment will accordingly be awarded in the sum of $2,159.25, together with interest on $777.77 from date of judgment until paid. It is so ordered.

LIBBY, McNEILL & LIBBY v. THE UNITED STATES

[No. A–85. Decided April 16, 1928]

On the Proofs

Purchase of packing-house products; contract with Quartermaster Corps, U. S. Army; formality of execution; failure to fix price; allotment by Food Administrator; breach by Government; measure of damages.—See *Swift* v. *United States*, 59 C. Cls. 364.

The Reporter's statement of the case:

Mr. G. Carroll Todd for the plaintiff. *Mr. William H. Long* and *Gregory & Todd* were on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant *Mr. Charles F. Jones* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, Libby, McNeill & Libby, is, and at and before the time herein involved was, a corporation duly organized under the laws of Maine, with its principal place of business in the city of Chicago, county of Cook, State of Illinois.

It was founded for the purposes, among others, of purchasing live stock and converting the same into fresh and cured meats for human consumption, and the transaction of all business incident to a general slaughtering and packing establishment, and was so engaged at all times involved herein.

II. The plaintiff's plant for the production of canned meats is located at Chicago, Illinois.

III, IV, V, VI, VII, VIII. [Same as in *Swift* v. *United States*, 59 C. Cls. 364.]

IX. In supplying the needs of the Army for bacon and other packing-house products, including canned meats, during the early stages of the war, the regular method of advertising for and receiving bids and letting contracts to lowest bidders, if otherwise satisfactory, was adhered to, but later on, in 1917 and during 1918, the needs had so grown and were so rapidly approaching the capacity of the packing plants that this method became impracticable, and the necessity for a constant and ever-increasing flow of supplies of this character made necessary the resort to other purchase and procurement methods.

The office of the depot quartermaster, afterwards the zone supply officer, at Chicago was informed from time to time by the proper authorities at Washington as to the number of men which would be in the service within stated times, and the duty devolved on the depot quartermaster of procuring supplies of the kind in question sufficient for the indicated number of men without the issuance of specific authorization to him in each instance to purchase or specific instructions as to quantities to be purchased. And because of the time required to cure, smoke, and can Army bacon and prepare other meat supplies it was necessary to anticipate needs therefor.

The plan was adopted by the depot quartermaster at Chicago of calling into conference with him or his authorized assistant, from time to time, representatives of this plaintiff and the six other large packing houses, at which conferences the packers' representatives were informed as to the needs of the Government for a stated period, usually three months, sufficiently in the future to give time for manufacture, and asked to indicate what portion of the stated needs each would furnish. Upon receipt of the statements from the packers as to what quantities they would furnish, which were submitted in writing and usually within a few days after the conference, the depot quartermaster made an allotment to each packer and notified each as to the quantities it would be expected to furnish during each month of the period involved.

Only representatives of the large packers were called into these conferences, because upon them chief dependence for adequate supplies must be placed, but the smaller packers were also called upon, and as needs increased were urged to furnish as much as they could of their products.

X. Since there were many elements entering into cost of production as to which there were frequent fluctuations, it was not practicable to undertake to determine prices so far in advance, and, accordingly, instead of fixing prices at the time the proposals were submitted, or notices of allotments issued, it was agreed that prices would be determined at or near the first of each month for the product to be furnished during that month. This was at a time when of necessity the preparation of the product was well under way, approaching completion as to a large part thereof, and when the cost of the green bellies, the basic element of final cost of bacon, and other fluctuating elements of cost of all products were ascertainable.

At about this time the usual form of circular proposals were sent to the packers, not for use in submitting bids as under the peace-time competitive system, but as a convenient method for formal submission by the packers of their proposals as to price for the product which they had theretofore been directed to furnish during the month in question and which already, by direction of the depot quartermaster, was in process of preparation.

Upon submission of these proposals as to price, if the same were satisfactory to the depot quartermaster or, otherwise, upon adjustment to a satisfactory basis, purchase orders were issued which furnished the basis of payment, although the purchase orders frequently were not issued until a part and sometimes all of the product covered thereby had been delivered.

XI. The needs for bacon and other meat products, including canned roast beef, canned corned beef, and canned corned-beef hash, rapidly grew as the number of men to be provided for increased, and early in 1918 it became apparent that capacity production on the part of the plaintiff and the other large packers would be required. They were accordingly informed at one of the conferences held that they

would be expected to produce to capacity, a statement which was frequently repeated, and it was understood that the Army would need and would take capacity production until further notice. A survey was made of the packing plants to determine their capacity in order that it might be known whether they were producing to capacity.

XII. On the 10th day of August, 1917, after the passage of the food control act, approved that day, 40 Stat. 276, the President by Executive order created the United States Food Administration and conferred upon it the powers and authority given him by said act, and authorized it to carry into effect the provisions thereof and directed all departments and established agencies of the Government to cooperate with it in the performance of its duties. By proclamation of October 8, 1917, he required all packers whose annual sales exceeded $100,000 to obtain a license of the Food Administration as a condition of carrying on business after November 1, and such a license was issued to the plaintiff.

Effective November 1, 1917, the Food Administration issued regulations applicable to all licensed packers, of which the plaintiff was informed, directing, among other things, that their books should be kept as theretofore unless otherwise ordered, that they should be subject to examination by the Food Administration, that they should so conduct their business that their profits should not exceed 9 per cent of their investment, or 2½ per cent of their gross sales, and that they should make periodic reports of their business in whatever detail the Food Administration might direct. The plaintiff complied with these regulations; it continued to keep its books as theretofore; no instructions were received to adopt any other system; they were periodically examined, as often at 12 times in one year, by representatives of the Food Administration, and it was determined that plaintiff's profits during the period of control by the Food Administration did not exceed the prescribed limit.

XIII, XIV. [Same as in *Swift* v. *United States*, *supra*.]

XV. At a meeting of the Food Purchase Board held on July 16, 1918, it was concluded that on account of the shortage which had developed in canned meats and bacon these

products should be placed on an allotment basis. On August 12, 1918, the depot quartermaster at Chicago was notified from the office of the Quartermaster General by the officer in charge of the subsistence division that it was understood that tinned meats, including tinned bacon and smoked bacon, would be allocated by the Food Administration, and he was requested to cancel orders which had been placed with the packers and ask allotments of the same from the Food Administration.

XVI. On November 9, 1918, a conference was held on the call of General Kniskern, at which he and Major Skiles, for the Government, were present, and representatives of the seven large packers, including Libby, McNeill & Libby, for the purpose of providing allotments of bacon and other meat products for the months of January, February, and March, 1919. The quantity of bacon asked for for the three months stated was 60,000,000 pounds, 30,000,000 each of serials 8 and 10. The quantities of other canned meats asked for for the same three months were: Of canned roast beef, 39,000,000 1-lb. cans and 11,000,000 2-lb. cans; of canned corned beef, 39,000,000 1-lb. cans and 11,000,000 No. 2 cans (No. 2 cans contain 1½ lbs.); of canned corned-beef hash, 17,000,000 1-lb. cans and 3,000,000 2-lb. cans.

On November 23, 1918, Libby, McNeill & Libby sent to the Depot Quartermaster at Chicago the following communication:

NOVEMBER 23RD, 1918.

O. F. Skiles,
Major, Q. M. R. C., Depot Quartermaster,
1819 West 39th St., Chicago.

C. C. Beef—Roast Beef—C. B. Hash

DEAR SIR: We herewith wish to confirm our offer to you on the following canned meats for delivery as follows:

	C. C. beef			Roast beef	C. B. hash
	12 oz.	*16 oz.*	*24 oz.*	*32 oz.*	*32 oz.*
January	2,700,000	100,000	850,000	600,000	1,000,000
February	2,700,000	850,000	850,000	1,200,000	1,000,000
March	2,700,000	850,000	850,000	1,200,000	1,000,000
Total	8,100,000	1,800,000	2,550,000	3,000,000	3,000,000

The 12 oz. C. C. beef delivery will be of our regular 12 oz. commercial pack goods.

Yours truly,

By LIBBY, MCNEILL & LIBBY,
By E. D. BALDWIN.

Beef Department.
SDB:AMW.

On December 11, 1918, the Food Administration, by Major Roy, with the approval of the chief of the meat division, whose assistant he was, issued the following:

DECEMBER 11, 1918.
D. C. P. 2193.

Corrected allotment

To replace allotment dated 12/3/18

From: U. S. Food Administration, Meat Division.
To: Libby, McNeill & Libby, U. S. Yards, Chicago, Ill.
Subject:

1. On requisition of the packing house products branch, subsistence division, office of Quartermaster General, 1819 W. 39th St., Chicago, Ill., you have been allotted for delivery during the month of—

	Product	Quantity	Price
		Pounds	
January, 1919	Corned beef	3,400,000	To be determined later.
February, 1919	do	4,150,000	
March, 1919	do	4,150,000	

2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

3. For any further information regarding this allotment, apply to the packing house products branch, subsistence division, office of the Quartermaster General, 1819 W. 39th St., Chicago, Ill.

UNITED STATES FOOD ADMINISTRATION,
Meat Division.

By E. L. ROY.

F Accepted.

Additional allotment

DEC. 11, 1918.
D. C. P. 2215.

From: U. S. Food Administration, Meat Division.
To: Libby, McNeill & Libby, U. S. Yards, Chicago, Ill.
Subject:

1. On requisition of the packing house products branch, subsistence division, office of Quartermaster General, 1819 W. 39th St., Chicago, Ill., you have been allotted for delivery during the month of—

	Product, roast beef	Quantity, corned-beef hash	Price
	Pounds	*Pounds*	
January, 1919	1,200,000	2,000,000	To be determined later.
February, 1919	2,400,000	2,000,000	
March, 1919	2,400,000	2,000,000	

2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

3. For any further information regarding this allotment, apply to the packing house products branch, subsistence division, office of the Quartermaster General, 1819 W. 39th St., Chicago, Ill.

UNITED STATES FOOD ADMINISTRATION,
Meat Division.

By E. L. ROY.

F Accepted.

Major E. L. Roy, Quartermaster Corps, National Army, then a captain, was by orders of the Chief of Staff, dated July 22, 1918, directed to proceed to Chicago and report to the Depot Quartermaster for assignment to temporary duty with the Food Administration. He became assistant to the Chief of the Meat Division of the Food Administration in charge of the Chicago office of that division and remained with the Food Administration in that capacity until his resignation on December 10, 1918, following his discharge from the Army.

Two copies of each of these notices were sent to Libby, McNeill & Libby. On one copy of each notice was stamped the word "Accepted," followed by this instruction: "To be signed and returned to the Meat Division, 11 West Washington Street, Chicago."

Libby, McNeill & Libby indicated its acceptance by writing below the word "Accepted" the following: "Libby, McNeill & Libby, H. W. Souther, 12/13/18," and returned this copy to the Food Administration.

On December 9, 1918, the packing house products branch of the subsistence division, office of Director of Purchase and Storage at Chicago, sent the following communication to Libby, McNeill & Libby:

DEC. 9, 1918.

From: Officer in Charge Packing House Products Br., Subsistence Div., Office Director of Purchase and Storage.
To: Libby, McNeill & Libby, Union Stock Yards, Chicago, Ill.
Subject: Canned Meat Allotments, January, February, and March.

1. In connection with the allotments made by the U. S. Food Administration for beef corned, beef roast, and hash corned beef scheduled for delivery during the months of January, February, and March, please be informed that it is the desire of this office that quantities of the various products be packed in accordance with the schedule indicated below:

Beef corned January	3,400,000 lbs.
to be packed	2,700,000 12 oz. cans.
	100,000 1 lb. cans.
	850,000 No. 2 cans.
Beef corned Feb. & Mar	4,150,000 lbs. monthly.
to be packed	2,700,000 12 oz. cans monthly.
	850,000 1 lb. cans monthly.
	850,000 No. 2 cans monthly.
Beef roast January	1,200,000 lbs.
to be packed	600,000 2 lb. cans.
Beef roast Feb. & Mar	2,400,000 lbs. monthly.
to be packed	1,200,000 2 lb. cans monthly.
Hash corned beef	2,000,000 lbs. monthly.
to be packed	1,000,000 2 lb. cans monthly.

2. You are urgently requested to advise this office by return mail at what points you anticipate putting up these allotments so the various zone supply officers, inspectors, etc., may be properly informed and in position to handle this production intelligently.

By authority of the Director of Purchase and Storage:

A. D. KNISKERN,
Brigadier General, Q. M. Corps, Officer in Charge.
By O. W. MENGE,
2nd Lieut., Q. M. Corps.

OWM.MJP.

XVII. Soon after the armistice the Food Administration began to "taper off" its activities in various directions, adopting a program of discontinuance of its activities as early as possible. It made no further allotments of meat products and fixed no price for bacon or for canned roast beef, canned corned beef, or canned corned-beef hash after that for December delivery.

On December 16, 1918, General Kniskern was instructed by telegraph as follows:

Brig. Gen. A. D. KNISKERN, *Chicago, Ill.:*

Effective with January requirements, the Army will purchase packing-house products independently of Food Administration.

This office is notifying Food Administration accordingly. You are authorized to proceed on this basis. Please wire acknowledgement.

WOOD, *Subsistence*, BAKER.

Thereafter prices for January and February deliveries were determined as they had been during the earlier months of 1918 before that function came to be exercised by the Food Administration.

XVIII. On January 24, 1919, the following communication was sent to Libby, McNeill & Libby:

JANUARY 24, 1919.

From: Zone Supply Officer, Zone Seven, Packing House Products Branch, Subsistence Division, Office Director Purchase and Storage.

To: Libby, McNeill & Libby, Union Stock Yards, Chicago, Ill.

Subject: Packing-house products.

1. Due to the large quantities of bacon, corned beef, roast beef, and corned-beef hash now on hand, and in view of the fact that the Army is rapidly being demobilized and the demand constantly decreasing, you are informed that this office will not be in the market for any of the above-mentioned products for delivery during the month of March, 1919, except as hereinafter stated.

2. Such quantity of bacon as is now in process of cure, over and above the quantity necessary to take care of February awards, and which has been passed by inspectors of this office, will be accepted.

3. This information is furnished you for the purpose of giving as much advance notice as possible of the intentions of this office, in order that you may take such steps as you may deem necessary toward the reconstruction of your commercial trade.

4. There is at present no likelihood of any further purchases of the products mentioned for several months.

5. Please accept the sincere thanks of this office for the hearty and loyal cooperation your firm has so generously given in the past, without which the difficulties of securing sufficient meat foods for the Army would have been well nigh unsurmountable.

By authority of the Director of Purchase and Storage:

A. D. KNISKERN,
Brigadier General, Q. M. Corps, Zone Supply Officer.
O. F. SKILES,
Major, Quartermaster Corps.

OFS-JW

XIX. On March 7, 1919, another notice was sent by General Kniskern to Libby, McNeill & Libby reading as follows:

MARCH 7, 1919.

From: Zone Supply Officer, Zone 7, Packing House Products Branch, Subsistence Division, Office Director Purchase & Storage.
To: Libby, McNeill & Libby, Union Stock Yards, Chicago, Illinois.
Subject: Extension of delivery date on packing-house products.

1. You are informed that the date of delivery of corned beef, roast beef, corned-beef hash and issue bacon which your contracts required you to have completed by February 28, 1919, has been extended to permit delivery on or before March 31, 1919.

2. You are further advised that none of the above-mentioned commodities over and above the quantities noted on February contracts will be required by this office. It will therefore be necessary for you to discontinue production immediately on such commodities which are not intended to apply against the February contract. Should, however, you have any issue bacon which is now in smoke and which is in excess of the amount required for February delivery, same will be accepted. Under no condition will any more bacon be placed in smoke for this office.

3. It is the intention of this office to enter into negotiations with your firm with a view of making settlement for

such material as you now actually have on hand, which can not be utilized after completion of the February contract.

4. It will not be necessary to communicate with this office either in person or by correspondence with a view to making any arrangements other than those outlined herein.

5. As soon as possible this office will call upon you for certain information, upon receipt of which negotiation will begin. In the meantime you are instructed to use every effort to dispose of such material, as you now have on hand, in order that adjustment may be quickly made. This office will proceed with this work as rapidly as is consistent with other business connected herewith.

By authority of the Director of Purchase and Storage:

A. D. KNISKERN,
Brigadier General, Quartermaster Corps,
Zone Supply Officer.
O. F. SKILES,
Major, Quartermaster Corps.

OFS–JW

XX. Libby, McNeill & Libby had left on hand 2,694,786 pounds of raw or green canning beef, purchased prior to receipt of the notice to stop production, and necessary for the production of the canned corned beef, canned roast beef, and canned corned-beef hash offered by its before-mentioned letter of November 23, 1918, for delivery in March, 1919, and which the Food Administration by its before-mentioned letters of December 11, 1918, allotted to it for delivery in that month, and which the depot quartermaster by his before-mentioned letter of December 9, 1918, requested it to deliver. This raw canning beef yielded, after cooking, 1,562,976 pounds of corned beef, into which it was converted by Libby, McNeill & Libby and packed in commercial size or 12-oz. cans, making 2,083,968 such cans as the best way in its judgment of disposing of it with the least loss after the War Department gave notice that it would not take the March installment of canned meats. The cost of manufacture thereof to Libby, McNeill & Libby was $721,443.05. It was sold for $616,153.42, after deducting expenses, making the net loss of Libby, McNeill & Libby, on account of this material, $105,289.63.

XXI. A reasonable manufacturing profit on the 1,562,976 pounds of canned corned beef, within the limits provided by

the regulations of the Food Administration then in force and applicable to the plaintiff as a licensee, was $18,036.07, being 2½ per cent of the cost of manufacture.

XXII. Libby, McNeill & Libby also had left on hand, over and above the tin plate used in packing the 1,562,976 pounds of canned corned beef, 14,423.84 base boxes of tin plate purchased prior to receipt of the notice to stop production and necessary for the canning of the corned beef, roast beef, and corned-beef hash ordered for delivery in March, 1919, as aforesaid, on which it sustained a loss of $10,817.88.

XXIII. Recapitulated, the loss sustained by Libby, McNeill & Libby was as follows:

Cost of 1,562,976 pounds of canned corned beef (2,083,968 12-oz. cans) into which the raw canning beef left on hand and which was required to fill the March delivery of canned meats was converted in order to dispose of it (Finding No. XX)	$721, 443. 05	
Profit thereon at 2½ per cent (Finding No. XXI)	18, 036. 07	
		$739, 479. 12
Less net proceeds of resale of said 1,562,976 pounds of canned corned beef (Finding No. XX)		616, 153. 42
		123, 325. 70
Loss sustained on 14,423.84 base boxes of tin plate on hand for production of the March delivery of canned meats		10, 817. 88
Total loss		134, 143. 58

The court decided that plaintiff was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

This case is controlled by the decision of the United States Supreme Court in the case of *Swift & Company* v. *United States*, 270 U. S. 124. The contract which is the basis of this action was entered into at the same time, and for the same purpose, through the same Government official as in the *Swift case;* and the reason for the failure of the Government to fully execute the contract is also precisely the same as in that case. When the Government notified plaintiff to

Opinion of the Court

cease production under the contract plaintiff had on hand 2,694,786 pounds of raw canning beef purchased prior to receipt of said notice for manufacture under the contract. The instruction from the Government contained in a communication from General Kniskern, officer in charge, was "to use every effort to dispose of such material as you may now have on hand in order that adjustment may be quickly made," and that "it will not be necessary to communicate with this office, either in person or by correspondence, with a view to making any arrangements other than those outlined herein." There were only two methods open to plaintiff—to try to dispose of the material in its raw condition or convert it into a marketable finished product. Plaintiff proceeded at once with the manufacture of this raw material into the canned product by the usual process and disposed of same at a loss of $134,143.58. Defendant does not deny its liability, but contends that by adopting a different method of disposing of the material on hand plaintiff could have realized a larger sum, thereby reducing the damages. Specifically, defendant's contention is that said material should have been sold promptly in the market in its raw state, and alleged that it had a market value of 23 cents a pound. The record, however, shows not only that it did not have such a market value, but that at that particular time there was no market for it in any considerable quantity. In adopting the method employed for the disposition of this material plaintiff acted in good faith and in accordance with its best judgment, and this course meets the spirit of the rule announced in the *Swift case*.

In view of the patriotic and praiseworthy cooperation of plaintiff and others in its class in meeting the demands of the Government during the stress of war-time needs, as reflected in the judicial history of the country, it is, to say the least, unfortunate that plaintiff has so long been denied the remedy provided by law, which in this case is the recovery of actual out-of-pocket losses, without interest; and especially does this observation refer to the period which has elapsed since the final decision in the *Swift case*. Plaintiff

is entitled to recover the amount sued for, and it is so ordered and adjudged.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

ANDREWS-BRADSHAW CO. v. THE UNITED STATES

[No. E-356. Decided April 16, 1928]

On the Proofs

Income tax; personal-service corporation; sec. 200, revenue act of 1918; devotion of entire time to business of corporation; military activities of a principal stockholder.—Where the income of a corporation is derived from commissions on sales made through the individual efforts of its principal stockholders, and one of them temporarily engages in military activities during the war, such withdrawal of personal services does not have the effect of changing the status of the corporation from one " whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation," sec. 200, revenue act of 1918, nor does the said section require that all of the principal stockholders devote their time exclusively to the business of the corporation.

The Reporter's statement of the case:

Mr. Albert H. Putney for the plaintiff.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Alexander H. McCormick* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation incorporated under the laws of the State of Pennsylvania and having its place of business in Pittsburgh.

II. Plaintiff's business during 1918 and 1919 was investigation of methods of operation, special problems in operation

and efficiency, etc., of steam power plants, and finding ways and means of overcoming obstacles by the use of specialized power-plant designed equipment. Also in the sale of such power-plant equipment to customers.

Plaintiff's income was derived from commissions paid it by the manufacturers of specialized power-plant equipment which it recommended to power-plant engineers should be used for their special conditions and to obtain results for which the plaintiff had previously recommended the equipment. Its compensation was a percentage on the sales price of the equipment sold.

Plaintiff investigated particularly troublesome installations or troublesome operations of steam power plants in the Pittsburgh territory, and where it found that some form of equipment, manufactured by these companies it represented, would meet the needs of the particular requirements it would then make recommendations, and if an order was placed for such equipment plaintiff would receive a commission from the manufacturer. There were some six or eight manufacturers plaintiff represented in this way.

III. The original capital put into plaintiff's company was $600, and there was subsequently invested somewhere between $3,000 and $4,000. This subsequent investment was out of earnings allowed to accumulate, and was utilized to pay the office force and take care of the fact that its commissions were usually not paid for from two to four months after a sale. Plaintiff carried no stock. Its office equipment at Pittsburgh was two rooms as sales and engineering office, and it employed a stenographer and bookkeeper and an engineer to assist in drafting work and routine engineer work under its direction.

A surplus of about $21,000 shown at the close of 1919 was an accumulation from earnings and commissions, and a material amount of it was not available in dividends and had been invested during the war in Liberty bonds. Plaintiff accounts for an item of $20,000 commissions as having been placed on its books as due it upon sale of equipment though the equipment would not be actually paid for for two to four months longer.

IV. During 1918 and 1919 the stockholders were Grant D. Bradshaw, holding approximately 55.2 per cent of the total issue of stock; E. J. Andrews, holding 22.4 per cent; and Roger W. Andrews, holding 22.4 per cent, making up the entire 100 per cent of the stock.

E. J. Andrews was directly connected with the business but not devoting his entire time to it. He was a lawyer, an officer of the company, and received compensation from the company stated. He was directly in charge of the Chicago territory work and was located in Chicago, Illinois. Plaintiff's Chicago office was in his office. A man plaintiff had in charge of the work there reported directly to him, and he, E. J. Andrews, took care of all legal as well as patent matters for the plaintiff and consulted with it on contract work.

Roger W. Andrews during 1918 and 1919 was an officer, director, and stockholder in plaintiff company, being its sales manager, secretary and treasurer, and engineer in charge of various phases of installation work, designing, research work, and other phases of specialized engineering work in steam-power plant work. In sales-manager work there was nothing particular to do in 1918 and 1919, as the company did not have a corps of sales engineers. In the year 1918 and until March 25, 1919, Roger W. Andrews was entirely inactive in the work of the company, being an officer in the Air Service in France. He was discharged from the Air Service March 24, 1919, and was actively and wholly connected with the business from the next day.

Grant D. Bradshaw was during 1918 and 1919 president of the plaintiff company; had complete charge of the sales development and the engineering features of the work in the Pittsburgh district for the various companies plaintiff represented. He was a graduate engineer; had been engaged in engineering work since 1904 and had had extensive experience in such work. Plaintiff was handling the sales development for six or eight different manufacturers who dealt principally in special steam equipment and the work covered the development of a market for such steam equipment which at that time was not considered as standard practice in power-plant engineering. The said Bradshaw, during 1918 and

1919, used his expert knowledge in going through a company's plant and pointing out to those in charge where improvements could be made in the plant's efficiency in reduction of costs and in change of operation, changes which in most cases involved the purchase of some of the equipment plaintiff was handling. Grant D. Bradshaw gave his entire time to the company.

V. Roger W. Andrews had been chief engineer and later sales manager of the Northern Equipment Company, of Erie, Pennsylvania, and in work for said company had been in a large number of the most important power plants in this and other countries investigating, doing research work, and experimental work on design, invention, and application of specialized equipment to meet the needs which he found in such plants. Neither Roger W. Andrews nor plaintiff had any financial interest in the companies plaintiff represented in selling their products to power plants.

One of the companies plaintiff acted as sales agent for was the Northern Equipment Company, which Roger W. Andrews had been sales manager for previous to the organization of plaintiff company. Said Northern Equipment Company had twenty other sales representatives, and none of them (the twenty) billed customers of that company in the same way plaintiff here did. In sales placed by plaintiff of machinery furnished by the Northern Equipment Company the sales were billed to the customer from the plaintiff and not from the Northern Equipment Company. The sale price was set by the Northern Equipment Company, and plaintiff never ordered any equipment from that company that it had not placed an order for with a customer.

Plaintiff's compensation was a commission on the sales price, and the Northern Equipment Company set both the percentage of commission and the sales price. Plaintiff carried no stock and equipment purchased of the Northern Equipment Company and sold by plaintiff was never shipped to it, but was shipped direct from the Northern Equipment Company to the customer. The orders to build and equip equipment which plaintiff took were transmitted to the Northern Equipment Company after it got such orders. The

percentage of plaintiff's total sales derived from the Northern Equipment Company during 1918 and 1919 was 26½ per cent. Plaintiff never assumed any financial responsibility in the event that material shipped by the Northern Equipment Company failed to operate or the customer refused to accept it. There were several instances where customers refused to accept material furnished by the Northern Equipment Company, and in each instance the equipment was returned by the customer to the said company and any charges of theirs were completely canceled.

Money collected for goods from the Northern Equipment Company sold in the name of the Andrews-Bradshaw Company was paid to the Andrews-Bradshaw Company.

VI. Plaintiff made returns of income tax to the collector of internal revenue, Pittsburgh, Pennsylvania, for the years 1918 and 1919 as a partnership and personal-service corporation. An examiner of the internal revenue office, Pittsburgh, Pennsylvania, July 31, 1921, reported that plaintiff was a personal-service corporation. The Commissioner of Internal Revenue at Washington declined to recognize the plaintiff as a personal-service corporation and assessed it the additional sum of $1,788.90 as taxes upon income and excess profits for the year 1918 and $441.79 for the year 1919, making $2,230.69 for the two years. These additional assessments, totaling $2,230.69, plaintiff paid under protest August 8, 1923.

The court decided that plaintiff was entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

Plaintiff is a Pennsylvania corporation engaged in efficiency engineering and acting as sales agent for the sale of steam-power machinery. This suit is the result of a denial by the Commissioner of Internal Revenue to classify the corporation as a personal-service one whose income is ascribed primarily to the activities of the principal owners or stockholders. The corporation made its income-tax return for the years 1918 and 1919 upon the basis of a personal-service one. The commissioner increased its income and excess-profits tax to the amount of $2,230.69. The plaintiff

paid the same under protest, filed a claim for refund which was refused, hence this suit for the amount.

The case was referred to a commissioner of the court. The findings of the commissioner are satisfactory to both sides and admittedly correct. They have been adopted as the findings of the court.

The issue in the case is largely one of fact. Defendant relies principally upon the fact that E. J. Andrews and Roger W. Andrews did not during the years in question devote themselves regularly to the business of the corporation.

The applicable sections of the taxing act of 1918 read as follows:

Section 200 (40 Stat. 1058):

"SEC. 200. That when used in this title—

* * * * *

"The term 'personal service corporation' means a corporation whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation and in which capital (whether invested or borrowed) is not a material income-producing factor.

* * * * *"

Section 216 (40 Stat. 1069):

"SEC. 216. That for the purpose of the normal tax only there shall be allowed the following credits:

"(a) The amount received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal-service corporation out of earnings or profits upon which income tax has been imposed by act of Congress;

"(b) The amount received as interest upon obligations of the United States and bonds issued by the War Finance Corporation, which is included in gross income under section 213;

* * * * *"

Section 218 (40 Stat. 1070):

"SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether

distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

"The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership.

* * * * *

"(e) Personal-service corporations shall not be subject to taxation under this title, but the individual stockholders thereof shall be taxed in the same manner as the members of partnerships. All the provisions of this title relating to partnerships and the members thereof shall so far as practicable apply to personal-service corporations and the stockholders thereof: *Provided*, That for the purpose of this subdivision amounts distributed by a personal-service corporation during its taxable year shall be accounted for by the distributees; and any portion of the net income remaining undistributed at the close of its taxable year shall be accounted for by the stockholders of such corporation at the close of its taxable year in proportion to their respective shares.

* * * * *"

Section 231 (40 Stat. 1076):

"SEC. 231. That the following organizations shall be exempt from taxation under this title:

* * * * *

"(14) Personal-service corporations.

* * * * *"

Section 304 (40 Stat. 1090):

"SEC. 304. (a) That the corporations enumerated in section 231 shall, to the extent that they are exempt from income tax under Title II, be exempt from taxation under this title."

The plaintiff corporation was originally organized with a capital of $600. Thereafter $3,000 or $4,000 of the earnings of the company were invested and utilized to pay the office force and care for earned but deferred payments of com-

missions. By 1919 it had accumulated a surplus of about $21,000, most of which had been invested in Liberty bonds. It occupied two rooms in a building in Pittsburgh and employed a stenographer, bookkeeper, and an engineer, from which it is more than evident that "capital (whether invested or borrowed) is not a material income-producing factor."

Grant D. Bradshaw owned 55.2 per cent of the stock, E. J. Andrews and Roger W. Andrews each owned 22.4 per cent of the stock, and these three men owned together all of the stock of the corporation. The activities of the corporation were restricted to but two sources of income, both of which involved strictly personal services. Grant D. Bradshaw, the president of the company, had charge of the sales development and the engineering activities of the company in the Pittsburgh district. He was in fact a graduate and an efficiency engineer. The company was acting as sales agent for six or eight manufacturers of steam equipment machinery, and developed a demand for such by visiting and inspecting various steam-power plants, pointing out to the operators thereof troublesome installations and operations of existing equipment and suggesting changes calculated to produce a maximum of efficiency at a minimum of cost.

E. J. Andrews was a lawyer by profession, having an office in Chicago, Illinois. The Chicago office of the plaintiff was in the same rooms with Andrews, and in addition to representing the plaintiff as to all legal and patent matters, looked after its contracts as well as supervised all that was done by an employee of the company in Chicago.

Roger W. Andrews, the remaining member of the corporation, was like Bradshaw, an efficiency engineer and salesman. He had been connected with the Northern Equipment Company of Erie, Pa., in a similar capacity prior to the organization of the plaintiff company, and after its organization the corporation acted as sales agent for said company. R. W. Andrews was active all the time in a personal way in behalf of the corporation, except from some date in 1918 until March 25, 1919, when he was serving as an officer in the Air Service in France.

The corporation carried no stock in trade and its income was derived from commissions on sales of steam-plant equipment. As a matter of fact, the Government's single defense depends wholly upon a contention that E. J. Andrews did not devote his entire time to the business of the corporation, and Roger W. Andrews was precluded from so doing during the period of time involved by his continued absence abroad as an officer in the Air Service.

We think the contention is without merit. Eliminating for the purposes of the present discussion the status of E. J. Andrews, we think the record establishes as a matter of fact and law that the income of the plaintiff is to be ascribed primarily to the principal stockholders regularly and actively engaged in conducting the affairs of the corporation. Bradshaw owned 55.2 per cent of the stock. His status under the taxing law is not challenged. R. W. Andrews owned 22.4 per cent of the stock. Their combined holdings totaled 77.6 per cent, and both were active in a personal way, except during the period when R. W. Andrews was in France in the Air Service, and at the close of which, following his honorable discharge from the Army, he resumed his activities in the corporation. Was it the intention of Congress in providing for the tax exemption involved to withhold the exemption in the event of one of its stockholders being precluded from personal activities by service in the Army abroad during the war? The defendant admonishes the court that the issue involved is strictly a legal one, and the court is not concerned with the equities of the situation. The statute, we are told, makes express provisions and the courts have held that a corporation "may comply therewith and easily keep within the limits thereof if it so choose, or it may not if it otherwise prefers." *Matteson Co.* v. *Willcuts*, 12 Fed. (2d) 447, 448. We find no occasion to differ from this contention. May, however, the Government draft into the military service of the Nation in time of war, as it has a right to do, a constituent member of a corporation, and thereby for the time being convert by this act a personal-service corporation into one of another character? We think not. The record is silent as to whether R. W. Andrews was drafted or volunteered. In

any event, the question is immaterial; the status of the soldier is exactly the same. The members of this corporation did comply with the provisions of the exemption as stated in the taxing act. Beyond doubt the plaintiff was intended as a personal-service corporation and was in law and in fact one of that character, is at the present time entitled to that classification, and continued as such, except for the period of time when one of its principal stockholder's activities were suspended by the act of the Government itself because of war emergencies. In other words, three men organize prior to the war a personal-service corporation; its activities continue as such until the Government becomes involved in war and one of the members goes into the Army, either voluntarily or in response to the draft, and by his absence places the entire activities of the corporation upon those who remain. The fact of the absence of the one man in the Army invokes against the enterprise in which he is an important figure, for the time he is away, the burdens of a taxing statute, burdens he admittedly would have escaped except for a war crisis. The necessities of the Government in time of war, especially as to its fighting forces, are, of course, superior to the personal interest or business activities of those capable of military duty. Congress recognized this fact and enacted the act of March 8, 1918, 40 Stat. 440, "An act to extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war." This statute, most comprehensive in scope and detail, would have effectually precluded the enforcement of any liability as against this soldier personally, in any court, during his war service. If he had lost his life or contracted a disease in the service from which he thereafter died, no estate tax could have been assessed against his estate. Section 401 of the revenue act of 1918, 40 Stat. 1096–1097; *Monell* v. *United States*, No. H–282, decided by this court February 20, 1928 (64 C. Cls. 566); the familiar war risk insurance act, enacted to provide insurance by the Government for men in the Army. These statutes, and perhaps others which we do not at present have at hand, clearly reflect a governmental recognition of the *pro tanto* suspension of the civil liability

of an active soldier in time of war so that he may, unfettered by the usual responsibilities of civil activities, give his entire time to the cause of his Nation in actual warfare without fear of the loss of any civil rights and status during this period.

It is true the above are express statutory provisions providing exemptions and protecting rights, and that no similar provision is found in the taxing act under which the commissioner collected the tax now sued for, but suspended civil rights due to military service in time of war, and by the term "suspended civil rights" we mean as well the maintenance throughout the war service of the identical civil status occupied by the soldier on the date he entered the Army or Navy, enter into every congressional enactment which affects him personally because of such military service, unless some provision to the contrary obtains. We think that as a matter of law the officer involved was to all intents and purposes to be considered as an active member of the corporation during his military service, and entitled to the benefits of all exemptions to which he would have been entitled as a civilian during the same period.

The plaintiff is entitled to judgment for $2,230.69 with 6 per cent interest thereon from date of payment to date of judgment. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

KISSEL MOTOR CAR CO. v. THE UNITED STATES

[No. A-260. Decided April 16, 1928]

On the Proofs

Cancellation of contract; termination clause; liquidated damages for delay.—Upon finding that plaintiff's contract was duly canceled and delay in delivery of articles was due to the Government's delay in delivering materials called for by the contract, liquidated damages for delay were remitted and judgment was entered for plaintiff in accordance with the provisions of the termination clause.

The Reporter's statement of the case:

Mr. L. A. Spiess for the plaintiff. *Mr. John Walsh* was on the brief.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Kissel Motor Car Company, plaintiff herein, is now, and was at the times hereinafter mentioned, a corporation organized and existing under the laws of the State of Wisconsin, with its principal office and place of business at Hartford, Wisconsin, and engaged in the business of manufacturing and selling automobiles and automobile parts.

II. On or about December 11, 1917, Major W. G. Wall, acting as negotiating officer for the War Department, in the matter of four-wheel-drive trucks for the Army, entered into negotiations with George A. Kissel, president of the Kissel Motor Car Company, plaintiff herein, with a view to the Kissel Motor Car Company's entering into a contract with the War Department for the construction of 2,000 four-wheel-drive trucks for the United States Army. Several conferences were held between Major Wall and Mr. Kissel, president of the Kissel Motor Car Company, and between Major Wall and Roger M. Newbold, the Washington representative of the plaintiff company, in which the terms and conditions of the proposed contract were carefully considered by the parties. As a result of these conferences it was agreed by George A. Kissel, president of the Kissel Motor Car Company, and Major Wall that the Kissel Motor Car Company was to furnish the Government, for the Army, 2,000 F. W. D. trucks and certain spare parts on a cost-plus basis at a bogie price of $2,850.00 a truck, meaning a price which was set by the Government as the estimated price of a truck, with the understanding that steel wheels for the trucks were to be furnished by the Government and not charged against the bogie price, and that the contractor would furnish oil side and tail lamps, gas lamps, and acetylene generators.

It was further understood by and between the parties that the Kissel Motor Car Company should immediately begin making preparations for the manufacture of the 2,000 chassis and spare parts without waiting for a written contract, based on such negotiations, that was to follow in due course.

III. In the latter part of February a formal contract, numbered C. M. E. 518, was forwarded to the Kissel Motor Car Company, which contract was dated December 20, 1917. At the time said contract was forwarded to the Kissel Motor Car Company it was notified that the Government was in urgent need of the trucks and spare parts, and plaintiff was requested to sign the contract and return the same with the understanding that if there were any mistakes therein the same would be corrected by a supplemental contract. With this understanding plaintiff, through its proper officers, caused said contract to be executed and immediately brought to the attention of the Ordnance Bureau that there was a mistake in said contract; that the same provided that the contractor was to furnish steel wheels and that the Government would furnish oil side and tail lamps, when it was the intention of the parties that the contractor was to furnish the oil side and tail lamps and the Government was to furnish the steel wheels.

By the terms of the contract contractor obligated itself to manufacture and furnish to the Government 2,000 3-ton chassis of F. W. D. Auto Company, Model B, and sets of spare parts consisting of individual parts approximating in value thirty per cent of the cost of said 2,000 chassis. A true copy of said formal contract is attached to the petition, marked "Exhibit B," and is made a part of this finding by reference.

IV. The formal contract did not correctly express the intentions of the parties in that it erroneously provided that the contractor was to furnish the steel wheels and the Government was to furnish the oil side and tail lamps, whereas it was the intention of the parties that the Government should furnish the steel wheels and the contractor should furnish the oil side and tail lamps.

V. Thereafter the contracting section of the War Department, in order to correct the error made in the original contract, prepared and forwarded to the Kissel Motor Car Company a supplemental contract, proxy signed, dated May 6, 1918, which in part reads as follows:

"Whereas the parties hereto entered into an agreement dated December 20, 1917, for 2,000 3-ton chassis and sets of spare parts, and desire to amend and supplement said agreement, as hereinafter provided, in order to set forth a certain part of the original understanding which was omitted through oversight from the original contract:

"Now, therefore, under the laws of the United States in such cases made and provided, and in consideration of the mutual agreements herein contained, the said parties have agreed, and by these presents do agree, to and with each other as follows:

"ARTICLE I. The contractor agrees to furnish oil side lamps and tail lamps for the articles. The United States agrees to furnish f. o. b. cars at contractor's plant, without cost to the contractor, 2,500 sets of cast-steel wheels and 2,500 name plates at such times and in such quantities as will enable the contractor to perform all the terms of said contract. Such wheels and name plates shall remain the property of the United States, and the contractor agrees to use due and proper care in the handling and storing of same while in its possession.

"ARTICLE II. All other provisions of the agreement dated December 20, 1917, shall remain in full force and effect."

A true copy of the first supplemental contract is attached to the petition, marked "Exhibit C," and made a part hereof by reference.

VI. Due to the fact that the first supplemental contract was proxy signed, a second supplemental contract was prepared by the War Department, dated July 15, 1918, and executed by the parties, said contract in part reading as follows:

"Whereas the parties hereto entered into an agreement dated December 20, 1917, for a 2,000 3-ton chassis and sets of spare parts, and

"Whereas the parties desire to amend and supplement said agreement in the interest of the United States, as hereinafter set forth, so as to provide for the sets of spare parts to be furnished by the contractor, and so as to provide for certain additional items to be furnished for the chassis by

the contractor and by the United States, which items were omitted from the original contract through inadvertence.

"Now, therefore, under the laws of the United States, in such cases made and provided, and in consideration of the mutual agreements herein contained, the said parties have agreed, and by these presents do agree, to and with each other as follows:

* * * * *

"ARTICLE IV. The contractor agrees to furnish oil side lamps and tail lamps for the chassis. The United States agrees to furnish f. o. b. cars contractor's plant, without cost to the contractor, 2,000 sets of cast-steel wheels and 2,000 name plates at such times and in such quantities as will enable the contractor to perform all the terms of said contract. Such wheels and name plates shall remain the property of the United States, and the contractor agrees to use due and proper care in the handling and storing of same while in its possession. The provisions of this article were omitted from the original contract through inadvertence."

A true copy of the second supplemental contract is attached to the petition, marked "Exhibit D," and is made a part hereof by reference.

VII. The 2,000 sets of steel wheels provided for in the contracts were furnished by the Government to the contractor for use on the F. W. D. trucks to be constructed by the contractor. The steel wheels were purchased by the United States from different manufacturers and ranged in cost from $138.00 per set to $182.00 per set, and averaged in cost about $150.00 per set.

Contractor assisted the Government in the purchase of the steel wheels in that the officers of plaintiff company made inquiries of and wrote letters to various manufacturers of steel wheels, inquiring as to the price and also as to the ability of the manufacturers to furnish the steel wheels at such times as they would be needed by plaintiff company in the performance of its contract with the Government.

The 2,000 name plates referred to in the first and second supplemental contracts were furnished by the Government to the contractor and were not charged to or included in the bogie price.

The steel bodies attached to the 2,000 trucks by the contractor were furnished by the War Department to the con-

tractor and were not charged to or included in the bogie price.

On account of some slight changes that were made the bogie price was increased $7.20 per truck, thereby making the bogie or estimated price for each truck the sum of $2,857.20.

VIII. On the 25th day of September, 1918, the War Department sent the following letter to plaintiff:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY,
Washington, September 25, 1918.

From: Quartermaster General.
To: Kissel Motor Car Company, Hartford, Wisconsin.
Subject: Contract CME 518.

1. This office is in receipt of instructions from the purchasing officer to draw an amendment to the above contract, increasing the quantity of trucks to be delivered thereunder by 1,500 to be delivered during the months of February, March, and April, 1919.

2. The contract covering this amendment will be forwarded to you for signature in the course of a few days.

By authority of Acting Quartermaster General.

s/H. M. LEWY,
H. M. LEWY,
Captain, Q. M. C.,
Motors Division, Contract Section.

On October 21, 1918, a second letter was written to the plaintiff, as follows:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY,
Washington, October 21, 1918.

From: The Quartermaster General.
To: The Kissel Motor Car Company, Hartford, Wisconsin.
Subject: Second series F. W. D. Orders.

1. This will acknowledge and answer your letter of October 14th relative to the above.

2. Be advised that under the new contract to be prepared the contractor will be called upon to furnish everything, including the steel wheels, the gas headlight, and generator. A higher bogie price will be named and the profit of the contractor increased accordingly.

3. Full details will be furnished your company in the shape of a contract within a few days.

By authority of the Acting Quartermaster General.

s/H. M. LEWY,
H. M. LEWY,
Captain, Q. M. C.,
Contract Section, Motor Branch, Motors and Vehicles Div.

No formal contract was ever executed for the manufacture and delivery of the said 1,500 additional trucks.

IX. Under date of December 16, 1918, the following telegram was sent plaintiff:

"Your contract number CME five eighteen for F. W. D. spare parts is hereby terminated in the public interest."

Under date of December 26, 1918, the War Department sent plaintiff a letter confirming the telegram dated December 16, 1918.

On December 16, 1918, the date of the termination of the contract, the plaintiff had completed certain trucks and was holding them on account of the failure of the Government to supply cars for their transportation. It also had other trucks completed except the attaching of the wheels, which wheels the Government had failed to supply. It had manufactured and furnished only a part of the spare parts which the contract provided it should supply, due to the Government's delay in furnishing materials for their manufacture, and there was a certain amount of work in process.

X. The 2,000 trucks covered by the original contract CME 518 were constructed by plaintiff company and delivered to the United States, and accepted by the United States, but only a small part of the spare parts covered by contract CME 518, and the supplements thereto, was completed and delivered to the United States.

Plaintiff did some work on the order for 1,500 additional trucks, for which settlement has been made.

XI. Pursuant to the notice contained in the telegram of December 16, plaintiff suspended work on the additional 1,500 chassis and also on the spare parts. After the armistice plaintiff was requested by the Ordnance Department to extend its deliveries and to reduce the number of hours

during which labor was employed so as to keep the maximum number of men employed and thereby disturb labor conditions as little as possible. Due to the fact that the number of hours during which labor was employed was reduced, and to the further fact that the Government failed to furnish steel wheels and also to furnish cars to contractor at such times and in such quantities as were necessary, the contractor was prevented from delivering the trucks and spare parts as per schedule. Otherwise all the chassis and spare parts would have been completed and delivered on schedule time. Final deliveries of the chassis were made on May 29, 1919.

XII. Plaintiff was in arrears in making deliveries, but the delays were occasioned by the Government's failure to furnish materials at such times and in such quantities as were necessary. If the Government had furnished material at times when contractor needed it, contractor would have been able to make deliveries on schedule time.

XIII. As the work progressed and deliveries of the chassis and spare parts were made, payments were made thereon. All of the material and manufacturing costs were paid for and are not at issue in this action.

The total gross cost of the 2,000 F. W. D. trucks was $5,390,716.64. The total gross cost of the spare parts delivered was $45,938.78. The total gross cost of the work in process at the time the work was stopped was $47,574.69. The total gross cost of the 2,000 F. W. D. trucks that were delivered, the spare parts that were delivered, and the work in process was $5,484,230.11.

Plaintiff has been paid on account of profit on chassis delivered, the spare parts that were delivered, and the work $3,632.57, or a total of $537,688.09.

XIV. The actual cost of one F. W. D. truck was $2,695.36. The total cost of the 2,000 F. W. D. trucks was $5,390,716.64. The difference between the bogie price of $2,857.20 and the actual cost of one truck was $161.84. The difference between the bogie price of the 2,000 trucks and the actual cost was $323,680.00.

XV. If the contract was canceled by the telegram dated December 16, 1918, and the letter confirming the same dated

December 26, 1918, and plaintiff is entitled to twenty-five per cent of the saving on the 2,000 F. W. D. trucks that were delivered, it is entitled to a profit of $80,920.00. Twenty-five per cent of the $2,758.32, which was the saving to the Government on spare parts, is $689.58. Ten per cent profit on the total gross cost of the 2,000 F. W. D. trucks delivered is $539,071.66. Ten per cent profit on the spare parts that were delivered is $4,593.88, and ten per cent profit on the work in process is $4,757.47. If under the law the contract was canceled, plaintiff is entitled to a gross profit of $630,032.59.

In making settlement with the plaintiff the salvage value of certain tools, jigs, fixtures, etc., which plaintiff kept and retained, amounting to the sum of $1,100, was not taken into consideration. The original cost of these tools, jigs, fixtures, etc., was $6,576.80, but at the time the contract was canceled or finished the same were worth $1,100.

The difference between the total profit of $630,032.59 and the sum of $537,688.09, the same being the amount that the Government has paid on account of profit, is $92,344.50. Deducting from this amount the sum of $1,100 for the tools, jigs, fixtures, etc., that were retained by the plaintiff, leaves the sum of $91.244.50 unpaid.

XVI. If the contract was not canceled and the cost of steel wheels at $150.00 per set is not charged to the bogie price and not included in the cost, the profit due the contractor would be $225.00 on each of the 2,000 trucks delivered, or $450,000.00, plus a ten per cent profit on the cost of spare parts, amounting to $4,593.87, plus a ten per cent profit on the work in process, amounting to $4,757.46, or a total of $459,351.33, plus twenty-five per cent of the difference between the bogie price of $2,857.20 and the actual cost of $2,695.36, representing a saving to the Government of $161.84 on each truck delivered, or a total saving to the Government of $323,680.00 on the 2,000 trucks delivered. Twenty-five per cent of $323,680.00 is $80,920.00. Twenty-five per cent of $2,758.32, representing the saving on spare parts, is $689.58. On this basis the total profit would be $540,960.91. The difference between the sum of $537,688.09, which sum

has been paid to the plaintiff, and $540,960.91, is $3,282.82, which amount has not been paid.

XVII. If under the law the contract was not canceled and the cost of steel wheels at $150.00 per set is charged to the bogie price and included in the cost, contractor is entitled to a flat profit of $225.00 on each of the 2,000 F. W. D. trucks, or a total of $450,000.00 on the 2,000 F. W. D. trucks, plus a ten per cent profit on the spare parts completed, amounting to $4,593.88, plus a ten per cent profit on the work in process, amounting to $4,757.47, making in all a profit of $459,351.35.

On the basis that the steel wheels were included in the cost, the actual cost of each truck was $2,845.36. The difference between the actual cost and the bogie price of $2,857.20 is $11.84 on each truck, or the sum of $23,680.00 on the 2,000 trucks. Twenty-five per cent of $23,680.00 is $5,920.00. Twenty-five per cent of the $2,758.32, representing the saving on the spare parts, is $689.58.

The difference between the total profit, including the twenty-five per cent saving on the trucks and spare parts, amounting to $465,960.93, and the sum of $537,688.09, the same being the amount that the Government has paid on account of profit, is $71,727.16, which is on this basis an overpayment made to the plaintiff.

XVIII. Subsequent to the receipt of the telegram dated December 16, 1918, and subsequent to May 29, 1919, plaintiff submitted a claim to the Ordnance Claims Board in the sum of $93,090.86. The Ordnance Claims Board awarded plaintiff on said claim the sum of $47,401.22 in full settlement thereof, which plaintiff refused to accept.

In September, 1920, plaintiff filed an appeal from the award of the Ordnance Claims Board to the War Department Appeals Section, which board on the 18th day of December, 1920, rendered a decision holding that in determining the contingent profit to which plaintiff was entitled on the 2,000 chassis manufactured by it and delivered to and accepted by the Government, the cost of steel wheels should not be taken into consideration, and transmitted its decision to the Auditor for the War Department.

On the 6th day of April, 1921, the Auditor for the War Department certified as per certificate No. 105683, claim

No. 760450, for payment to the plaintiff, a voucher for the sum of $47,401.22 in full settlement of plaintiff's claim. A voucher for said amount was forwarded to plaintiff and plaintiff refused to accept the same and returned the check.

On or about the 29th day of May, 1921, plaintiff filed an appeal from the award of the Auditor for the War Department with the Comptroller of the Treasury, and on the 23d day of May, 1921, the Comptroller of the Treasury rendered a decision on plaintiff's claim, and certified that the sum of $18,095.67, consisting of $3,135.52 overpayment under contract CME 518 and supplements, and $14,960.15 liquidated damages, was due the Government from the plaintiff.

Under date of October 9, 1922, plaintiff company requested a review of the Comptroller of the Treasury's decision and settlement by the Comptroller General of the United States, and the Comptroller General rendered a decision holding that the Kissel Motor Car Company was indebted to the United States in the total sum of $93,095.67.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This suit arises out of a cost-plus contract, with two supplements thereto, formally executed by the plaintiff and the authorized representatives of the defendant on or about December 11, 1917, by which the plaintiff undertook to furnish to the Government 2,000 F. W. D. trucks and certain spare parts therefor. For the construction of the spare parts as well as the trucks the Government was to furnish certain materials and parts and the plaintiff certain parts by manufacture. There was fixed for the cost-plus basis a bogie or estimated price of $2,850 per truck, and the plaintiff was to be paid a tentative price on each truck, and on the completion or termination of the contract, an additional sum in case the actual cost was less than the estimated cost.

In the original contract a mistake was made in that it provided that the plaintiff should furnish steel wheels for the trucks and the Government certain spare parts, oil side and tail lamps, whereas the intention and understanding of the parties before the contract was executed were that the

Opinion of the Court

Government should furnish the steel wheels and the plaintiff the oil side and tail lamps. This mistake was corrected in the two said supplemental contracts, thus placing upon the Government the obligation to furnish the steel wheels. This is the construction we give to these contracts.

Thereafter, on September 15, 1918, the War Department gave the plaintiff an order for 1,500 additional trucks to be delivered in February, March, and April, 1919. No formal contract was entered into for the delivery of these trucks. Plaintiff did some work under the order, and the transaction is not of any significance here except that it bears out the construction we give to the above contracts, in that it provided that the plaintiff should furnish the steel wheels and an increase by reason thereof in the bogie price, showing that as the Government construed the previous contracts the Government was under obligation to furnish these wheels.

All of the material furnished and delivered in this case has been paid for at the tentative price. The court has found that the delays in delivery by the plaintiff were caused by the Government's delay in delivering the necessary parts and materials called for by the contract. The plaintiff is therefore not liable to be assessed for liquidated damages.

On December 16, 1918, the plaintiff's contract was terminated, and this termination was confirmed by letter of December 26. We hold that this telegram terminated the whole contract. On December 16, 1918, plaintiff had delivered a large number of the trucks, had some ready to deliver, and others completed except the attaching of the wheels, which the Government had not delivered. The delay in completion here was due to the failure of the Government to furnish the materials and the delay in delivery of the trucks completed was due to the failure of the Government to transport them. A part of the spare parts to be furnished by plaintiff at this time had been delivered, the delay in delivery of the balance being caused by the delay of the Government in supplying the necessary material. The Government afterwards supplied the wheels and transportation, and all of the trucks called for by the

Syllabus

contract were delivered and the plaintiff was paid on the basis of the tentative price.

The one question remaining in this case, therefore, is what is the plaintiff entitled to recover under the provisions of the termination clause of the contract.

Under the termination clause plaintiff was to be paid all costs and obligations incurred by it and not previously paid, pursuant to Article V of the contract, together with the fixed profit "herein provided upon all articles previously delivered and accepted," and in addition thereto a sum which together with all fixed profits theretofore paid would be equivalent to 10% of all cost which the United States had already paid or was obliged to pay, except cost of materials purchased by contractor and for use in the performance of the contract, but not used.

Article IV of the contract provides that in case of termination by the United States, if the actual cost should be found to be less than the estimate, the plaintiff should be paid 25% of the difference between the actual and estimated cost.

The figures and details determining the results under these two provisions of the contract are worked out in Finding XV, and show a sum due the plaintiff of $91,244.50.

Judgment should be entered for plaintiff for said sum, and it is so ordered.

Moss, *Judge;* Booth, *Judge;* and Campbell, *Chief Justice*, concur.

Green, *Judge*, took no part in the decision of this case.

E. M. OBERNDORFER, AS LIQUIDATOR OF L. FRANK & SON COMPANY, v. THE UNITED STATES

[No. A-333. Decided April 16, 1928]

On the Proofs

Suit by liquidator of dissolved corporation; substitution for corporation; Wisconsin statutes; judgment for use of creditors and stockholders.—A corporation of the State of Wisconsin, within three years before commencing suit in the Court of Claims,

Reporter's Statement of the Case

was dissolved by resolution of its stockholders and a "liquidator" appointed to whom the assets were turned over with directions to pay the corporate debts and taxes and to distribute the balance. The statutes of Wisconsin continue the existence of a corporation for purposes of liquidation three years after resolution dissolving it. After the three years had expired the liquidator applied for leave and was allowed to continue suit. *Held*, that a liquidator, so appointed and acting, is to be regarded as an assignee of the corporation, suing for the use of the creditors and stockholders thereof, and entitled to judgment accordingly.

Purchase of packing-house products; contract with Quartermaster Corps, U. S. Army; formality of execution; failure to fix price; allotment by Food Administrator; breach by Government; measure of damages.—See *Swift & Co. case*, 59 C. Cls. 364; 270 U. S. 124.

The Reporter's statement of the case:

Mr. William Cogger for the plaintiff. *Mr. John E. Hughes* was on the brief.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Charles F. Jones* was on the brief.

The court made special findings of fact, as follows:

I. In the years 1918 and 1919 L. Frank & Son Company, Inc., was a corporation of Wisconsin, having its plant and doing business at Milwaukee, Wisconsin. On December 31, 1919, the following resolutions were duly passed by the stockholders of the corporation:

"*Resolved*, That this corporation be and the same hereby is dissolved, and that the president and secretary be and they are hereby authorized to send certified duplicate copies of this resolution sealed with the corporate seal as provided by section 1789 of the statutes of Wisconsin for 1917, and acts amendatory thereof and supplementary thereto, to the secretary of state, and to perform all other acts necessary to effectually dissolve this corporation. Upon motion duly made and seconded, the following resolution was duly adopted, 1,455 shares voting in favor of said resolution, and no shares contrary thereto: *Resolved*, That the assets of the corporation be turned over to E. M. Oberndorfer, liquidator, with directions to pay the debts and liabilities of the corporation, and after payment or reserving for payment such

sums as in his judgment may be necessary for taxes and other liabilities, if any, to distribute the balance of the assets remaining to the stockholders pro rata according to their stock holdings at the close of business December 31, 1919, in the following order: First, by the returning to them their capital invested up to the amount of the par value of their shares; and, second, by distributing to them the balance of the surplus, if any, as and by the way of liquidation dividend. No further business coming before the meeting, the same is adjourned *sine die*."

Section 181.02 of the statutes of Wisconsin continues the corporate existence of a corporation for the purpose of liquidating for three years after resolution dissolving it. Said E. M. Oberndorfer is still acting as liquidator of L. Frank & Son Company.

II. On April 6, 1917, the Congress of the United States declared war against Germany, and on April 12, 1917, the following general order was promulgated by the Secretary of War:

General Orders, No. 49.

WAR DEPARTMENT,
Washington, April 28, 1917.

I—The following War Department orders are published to the Army for the information and guidance of all concerned:

WAR DEPARTMENT,
Washington, D. C., April 12, 1917.

Orders:

1. It is hereby declared that an emergency exists within the meaning of section 3709, R. S., and other statutes which except cases of emergency from the requirement that contracts for and on behalf of the Government shall only be made after advertising as to all contracts under the War Department for the supply of the War Department and the supply and equipment of the Army and for fortifications and other works of defense; and until further orders such contracts will be made without resort to advertising for bids in the letting of the same.

2. Where time will permit, information will be given to the munitions board constituted by the National Council of Defense, through the supply bureaus' representative, of orders to be made for supplies, with a view of assistance from the board in placing the orders and in order that the supplies of the War Department may be coordinated with those of the Navy and other executive departments and secured at prices not in excess of those paid by other departments.

3. It is to be understood, however, that the responsibility of the several supply bureaus for promptly supplying the needs of the Army must be recognized, and where time will not admit of the delay involved in consulting the munitions board the supply bureaus will retain their present initiative in contracting without reference to the board.

NEWTON D. BAKER,
Secretary of War.

By order of the Secretary of War:

H. L. SCOTT,
Major General, Chief of Staff.

Official:
H. P. McCAIN,
The Adjutant General.

III. By Special Orders No. 94, War Department, dated April 24, 1917, it was directed that Col. Albert D. Kniskern, relieved from duty as quartermaster, Central Department, "assume charge of the general depot of the Quartermaster Corps at Chicago, Ill.," and by Special Orders No. 193, War Department, dated August 20, 1917, it was directed that Capt. Otto F. Skiles, Quartermaster Officers' Reserve Corps, be assigned to active duty and proceed to Chicago, Illinois, "and report in person to the depot quartermaster for assignment to duty as his assistant."

Colonel (afterwards Brigadier General) Kniskern remained on duty as depot quartermaster at Chicago until his retirement on September 1, 1919.

IV. On July 3, 1918, by Office Order No. 491, Quartermaster General's Office, there was established in Chicago a packing-house products branch of the subsistence division of the Quartermaster General's Office to be located in the general supply depot of the Quartermaster Corps at Chicago, to be under the immediate direction and control of the depot quartermaster, and to be responsible for all matters pertaining to the procurement, production, and inspection of packing-house products, subject to the control of the Quartermaster General.

V. There were numerous other orders, circulars, bulletins, and notices, aside from those herein specifically referred to, which were issued from time to time, many of them by General Goethals as director of purchase, storage, and traffic, a division of the office of the chief of staff which came finally

to act in an executive rather than an advisory capacity, and many divisions, bureaus, and boards were created with assigned duties and authority, and reorganizations were had for the purpose of remedying defects in former organizations.

The furnishing of adequate meat supplies for the Army was within the authority and duty of the acting quartermaster general and afterwards within his authority and duty as director of purchase and storage. General Kniskern, as depot quartermaster at Chicago, was the authorized representative of the acting quartermaster general in the purchase of meat supplies and, while subject to any specific instructions which the acting quartermaster general might see fit to give him, his duty was to supply the needs, and specific authority as to each purchase was not required. There was in the office of the quartermaster general a subsistence division, but the chief duty it exercised in the matter of the purchase of meats was to supply General Kniskern with such information as might be available as to future needs, leaving it to him to supply them.

VI. In supplying the needs of the Army for packing-house products during the early stages of the war, the regular method of advertising for and receiving bids and letting contracts to lowest bidders, if otherwise satisfactory, was adhered to, but later on, in 1917 and during 1918, the needs had so grown and were so rapidly approaching the capacity of the packing plants that this method became impracticable, and the necessity for a constant and ever-increasing flow of supplies of this character made necessary the resort to other purchase and procurement methods.

The office of the depot quartermaster, afterward the zone supply officer, at Chicago, was informed from time to time by the proper authorities at Washington as to the number of men which would be in the service within stated times, and the duty devolved on the depot quartermaster of procuring supplies of the kind in question sufficient for the indicated number of men without the issuance of specific authorization to him in each instance to purchase or specific instructions as to quantities to be purchased.

VII. Since there were many elements entering into cost of production as to which there were frequent fluctuations, it was not practicable to undertake to determine prices so far in advance, and accordingly, instead of fixing prices at the time the proposals were submitted, or notice of allotments issued, it was agreed that prices would be determined at or near the first of each month for the product to be furnished during that month.

At about this time the usual form of circular proposals was sent to the packers, not for use in submitting bids as under the peace-time competitive system, but as a convenient method for formal submission by the packers of their proposals as to price for the product which they had theretofore been directed to furnish during the month in question.

Upon submission of these proposals as to price, if the same were satisfactory to the depot quartermaster or, otherwise, upon adjustment to a satisfactory basis, purchase orders were issued, which furnished the basis of payment.

VIII. The needs for meat products rapidly grew as the number of men to be provided for increased, and early in 1918 it became apparent that capacity production on the part of the plaintiff and the other large packers would be required.

IX. On the 10th day of August, 1917, after the passage of the food control act, approved that day (40 Stat. 276), the President, by Executive order, created the United States Food Administration and conferred upon it the powers and authority given him by said act, and authorized it to carry into effect the provisions thereof and directed all departments and established agencies of the Government to cooperate with it in the performance of its duties. By proclamation of October 8, 1917, he required all packers whose annual sales exceeded $100,000 to obtain a license of the Food Administration as a condition of carrying on business after November 1st, and such a license was issued to the plaintiff.

Effective November 1, 1917, the Food Administration issued regulations applicable to all licensed packers directing, among other things, that their books should be kept as

theretofore unless otherwise ordered, and that they should be subject to examination by the Food Administration.

The food purchase board was organized, with the approval of the Secretary of War and the Secretary of the Navy, on December 11, 1917, consisting of the officials suggested, or their authorized representatives, and on May 8, 1918, the President formally authorized the organization of the food purchase board to consist of a representative of the Secretary of War, the Secretary of the Navy, the Federal Trade Commission, and the United States Food Administration.

X. At a meeting of the food purchase board held on July 16, 1918, it was concluded that on account of the shortage which had developed in canned meats and bacon these products should be placed on an allotment basis. On August 12, 1918, the depot quartermaster at Chicago was notified from the office of the quartermaster general by the officer in charge of the subsistence division that it was understood that tinned meats, including tinned bacon and smoked bacon, would be allocated by the Food Administration, and he was requested to cancel orders which had been placed with the packers and ask allotments of the same from the Food Administration.

XI. On November 23, 1918, L. Frank & Son Company sent to the depot quartermaster the following letter:

NOV. 23RD, 1918.

WAR DEPARTMENT,
General Depot of the Q. M. C., Chicago, Ill.
(Attention Capt. J. C. Shugert.)

GENTLEMEN: We are pleased to inform you that we agree to furnish during the month of January, 1919, 345,000 cans corned-beef hash.

During the month of February, 1919, we agree to furnish 330,000 cans corned-beef hash.

During the month of March, 1919, we agree to furnish 405,000 cans corned-beef hash.

Each can to contain 32 ounces corned-beef hash, quality to be the same as we are now furnishing, and to be in accordance with Government specifications, the output to be inspected and accepted at factory daily.

All deliveries to be on a f. o. b. Milwaukee basis, at such price as the Food Administration may deem proper to fix.

The above deliveries are based on a five-day holding of cans.

Should the B. A. I. insist on holding cans ten days, the quantities above-mentioned would be changed as follows:

January	290,000	{420,000 1 lbs. / 50,000 2 lbs.
February	330,000	
March	375,000	

For your information, we want to say that we have placed orders with the Continental Can Co. to supply us with cans, to cover the above deliveries.

We trust to receive allotments for the above at an early date, and would thank you for an acknowledgment of this letter.

Very truly yours,

L. FRANK & SON COMPANY.

On November 26, 1918, the following communication was sent to the Chicago office of the Food Administration for the attention of Major Roy:

War Department, Office of the Quartermaster General, packing-house products branch, subsistence division, 1819 West 39th Street, Chicago, Ill.

Subsistence.

431 P. & S–PC.

NOVEMBER 26, 1918.

From: Officer in charge, packing-house products branch, subsistence division, Office Director of Purchase and Storage.

To: United States Food Administration, 757 Conway Bldg., Chicago, Ill. Attention Major E. L. Roy.

Subject: Allotments—Bacon and canned meats.

1. In connection with the requirements of this office—canned meats and bacon—for the months of January, February, and March, 1919, you are requested please to make allotments to the various packers of the items in the quantities and for delivery as is indicated below:

L. Frank & Son Company, corned-beef hash, January, 580,000 lbs.

L. Frank & Son Company, corned-beef hash, February, 660,000 lbs.

L. Frank & Son Company, corned-beef hash, March, 750,-000 lbs.

(There follow names of seventeen other packers followed by stated amounts of different products for each of the three months.)

2. It is requested that packers be informed at the earliest practical date allotments made to them, in order (sic) that they can make necessary arrangements for the procurement

of tins, boxes, and other equipment, as well as to know the quantities of green product it will be necessary for them to put in cure during December to apply on later deliveries.

3. Please send copy of the official allotments to this office for our records.

By authority of the Director of Purchase and Storage:

A. D. KNISKERN,
Brigadier General, Q. M. Corps, in Charge.
By O. W. MENGE,
2nd Lieut., Q. M. Corps.

OWM: JDW.

On December 3, 1918, the Food Administration, by Major Roy, assistant to the chief of meat division, and with his approval, issued the following:

United States Food Administration, Meat Division, 111 West Washington Street, Chicago, Illinois

DEC. 3RD, 1918.
D. C. P. #2199

From: U. S. Food Administration, meat division.
To: L. Frank & Son, Milwaukee, Wis.
Subject:

1. On requisition of the packing-house products branch, subsistence division, Office of Quartermaster General, 1918 W. 39th St., Chicago, Ill., you have been allotted for delivery during the month of—

	Product	Quantity	Price
January, 1919	Corned-beef hash	580,000 lbs	To be determined later.
February, "	" " "	660,000 "	
March, "	" " "	750,000 "	

2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

3. For any further information regarding this allotment, apply to the packing-house products branch, subsistence division, Office of the Quartermaster General, 1918 W. 39th St., Chicago, Ill.

UNITED STATES FOOD ADMINISTRATION,
MEAT DIVISION,
By E. L. ROY.

Accepted:
L. FRANK & SON CO.
R. F. OBERNDORFER,
Asst. Secretary L. Frank & Son Co.

Reporter's Statement of the Case

The placing of said orders and the making of said allotment was by officers and agents of the United States duly authorized thereunto.

On December 5, 1918, L. Frank & Son Company, by its assistant secretary and general manager, signed the above communication "Accepted" and returned it to the Food Administration with the following letter:

DEC. 5TH, 1918.

UNITED STATES FOOD ADMINISTRATION,
MEAT DIVISION,
Chicago, Illinois.

GENTLEMEN: We are pleased to acknowledge receipt of yours of the 3rd inst., filed DCP-2199, covering allotments of corned-beef hash during the months of January, February, and March, 1919.

In accordance with your request, we enclose herewith duplicate, properly signed and accepted, for which kindly accept our thanks, and oblige.

Yours very truly,

L. FRANK & SON COMPANY.

The quantities of corned-beef hash called for in the allotment for January and February were delivered to and paid for by the United States, but the United States refused to accept the March allotment.

On January 24, 1919, the following communication was sent to L. Frank & Son Company by the agent of the United States duly authorized thereunto, and was received by the company on January 27, 1919:

War Department, General Supply Depot, U. S. Army, Zone Seven, Packing House Products Branch, Subsistence Division, Office Director Purchase and Storage, 1819 W. 39th St., P. O. Lock Box 00, Chicago, Illinois

JANUARY 24, 1919.

From: Zone supply officer, Zone Seven, packing-house products branch, subsistence division, office Director Purchase and Storage.
To: L. Frank & Son Company, Milwaukee, Wisconsin.
Subject: Packing-house products.

1. Due to the large quantities of bacon, corned beef, roastbeef, and corned-beef hash now on hand, and in view of the

fact that the Army is rapidly being demobilized, and the demand constantly decreasing, you are informed that this office will not be in the market for any of the above-mentioned products for delivery during the month of March, 1919, except as hereinafter stated.

2. Such quantity of bacon as is not in process of cure, over and above the quantity necessary to take care of February awards, and which has been passed by inspectors of this office will be accepted.

3. This information is furnished you for the purpose of giving as much advance notice as possible of the intentions of this office, in order that you may take such steps as you may deem necessary toward the reconstruction of your commercial trade.

4. There is at present no likelihood of any further purchase of the products mentioned for several months.

5. Please accept the sincere thanks of this office for the hearty and loyal cooperation your firm has so generously given in the past, without which the difficulties of securing sufficient meat foods for the Army would have been well-nigh unsurmountable.

By authority of the Director Purchase and Storage:

A. D. KNISKERN,
Brigadier General, Quartermaster Corps,
Zone Supply Officer.

O. F. SKILES,
Major Quartermaster Corps.

XII. Soon after the armistice the Food Administration began to "taper off" its activities in various directions, adopting a program of discontinuance of its activities as early as possible. It made no further allotments of meat products, and fixed no price for bacon or for canned roast beef, canned corned beef, or canned corned-beef hash after that for December delivery.

On December 16, 1918, General Kniskern was instructed by telegraph as follows:

Brig. Gen. A. D. KNISKERN,
Chicago, Ill.:

Effective with January requirements, the Army will purchase packing-house products independently of Food Administration.

This office is notifying Food Administration accordingly. You are authorized to proceed on this basis. Please wire acknowledgment.

WOOD.
BAKER.
Subsistence.

Thereafter prices for January and February deliveries were determined as they had been during the earlier months of 1918 before that function came to be exercised by the Food Administration.

XIII. The loss sustained by L. Frank & Son Company by reason of purchasing material for the performance of the contract for the month of March, 1919, was as follows:

Total tonnage on hand after complete January and February, 1919, deliveries were made to the U. S. Government ---pounds--		119, 948
Value of tonnage based upon average price paid for meats used in manufacture of corned-beef hash December, 1918, January, February, 1919---		$24, 951. 14
Add 2½% remuneration in lieu of administrative and overhead expense---		623. 77
Actual storage paid to outside cold-storage warehouses April 1st to July 1---		1, 372. 52
Insurance paid after April 1st, 1919, to July 1st, 1919---		84. 44
Total cost---		27, 031. 87
Less:		
Amount realized from sales: Baker Food Company, 10,546 lbs. @ 10c---	$1, 054. 60	
Frank & Company, 109402 lbs. @ 10¾c---	11, 760. 72	
Total amount realized---		12, 815. 32
Net amount of loss sustained---		14, 216. 55

XIV. By reason of the Government's refusal to accept the corned-beef hash for March delivery, in accordance with the agreement above set forth, the L. Frank & Son Company suffered damages in the sum of $13,592.78.

Plaintiff made reasonable effort to dispose of said material and did dispose of same in a reasonable time and at reasonable market prices.

E. M. Oberndorfer, liquidator designated by the stockholders of L. Frank & Son Company, has applied for leave

and been allowed to prosecute this suit, which was originally instituted in the name of L. Frank & Son Company on the 16th day of December, 1921.

The court decided that plaintiff, as liquidator and assignee of L. Frank & Son Co., suing for the use and benefit of the creditors and stockholders thereof, was entitled to recover $13,592.78.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

This case in its general aspects is like that of *Swift & Co.*, 59 C. Cls. 364, 270 U. S. 124. That is to say, the legal principles governing the cases are the same. The facts are not materially in dispute. A corporation known as L. Frank & Son Company was called upon to furnish large quantities of "corned-beef hash" during the months of January, February, and March, 1919, for Army uses. The officer in charge of the packing-house products branch, subsistence division, Quartermaster General's office, being the director of purchase and storage, Brigadier General Kniskern on November 26, 1918, issued a requisition upon the United States Food Administration to make allotments for delivery by L. Frank & Son Company of 580,000 pounds of corned-beef hash in January; 660,000 pounds in February; and 750,000 pounds in March. As part of the same requisition there were included the names of seventeen other packers, with stated amounts of different products for each of the three months. Upon receipt of this requisition the United States Food Administration, meat division, addressed to L. Frank & Son Co. on December 3, 1918, its notice that on requisition of the packing-house products branch that company had been allotted for delivery during the three months above mentioned the quantity of corned-beef hash already stated, with the statement "Price to be determined later." This allotment was made by duly constituted agents of the Government and was accepted in writing by the company. In compliance with the allotment and its acceptance, the company actually delivered the quantities called for January and February deliveries. It was making preparations to carry out the bal-

ance of the contract by making deliveries in March when, on January 27, it received a communication from the office of Brigadier General Kniskern to the effect that the Government would not accept the products mentioned for March delivery, the reason assigned for this action being the demobilization of the Army then in process and the constantly decreasing demand for the meat products. The L. Frank & Son Company had made purchases of meat which it had on hand for use in supplying the March allotment, and on account of the falling prices occasioned by the Government's refusal to accept meat products the market value of these purchases was greatly lessened. It did all it could reasonably be expected to do to reduce its damages and finally sold at considerable loss the meat it had on hand. Its books were examined by Government accountants and its losses ascertained. One small item allowed by the accountant is rejected but the balance shown in the findings as the net amount of loss accords with the conclusions of these accountants. Under the principles stated in the *Swift & Co. case*, *supra*, there can be no question of the Government's liability for the damages resulting from its breach of the contract.

On behalf of the Government it is insisted, however, that the L. Frank & Son Company, a Wisconsin corporation, was dissolved by resolution of its stockholders, set forth in the findings of fact, that the Wisconsin statutes authorize a voluntary dissolution, and provide that when lawfully dissolved the corporation shall nevertheless continue for a period of three years to be a body corporate "for the purpose of prosecuting or defending actions and of enabling them to settle and close up their business, dispose of and convey their property and divide their capital stock," and that after the expiration of the three-year period the corporation becomes defunct, or, to use the language of defendant's brief, "it has no capacity to prosecute an action." For this reason the Government insists the petition should be dismissed, and to sustain this view there is cited *State, ex rel. Pabst*, v. *Circuit Court*, 184 Wis. 301. This case quotes the sections of the statutes relied upon and decides that the writ of prohibition should issue, restraining the further prosecution of an action against the Pabst Company because of

the dissolution of the latter by action of its stockholders in conformity with the provisions of the statutes. The period of three years having expired it was said: "The corporation being defunct and without legal existence, all actions against it abated" (p. 307).

It is to be noted that the action pending against the Pabst Company was an action *ex delicto* which would not have survived, at common law, the dissolution of the corporation, but whether the rule stated is the same or is different where the suit is by the corporation brought within the three years allowed by the statute, it is plainly necessary in order to invoke the statute that it be proved that a legal dissolution has taken place. Under the terms of the statute it is not only essential to show that the stockholders have taken appropriate action, but it is also essential that the formal proceedings required by the statute be complied with. There is no proof in the instant case that the resolution properly attested, as required by section 181.03 Stats. (*Pabst case*, p. 305), was filed with the Secretary of State or was accepted by him, or was recorded by the register of deeds. But the resolution alone is not sufficient proof. (*Pabst case*, p. 306.) But if it be assumed that the corporation was dissolved legally, it does not follow that the present action may not be maintained, because of the intervention of the person designated by the resolution of the stockholders. The action in this court was instituted within three years of the date of the resolutions looking to the corporation's dissolution. It was brought in the corporation's name. The statute authorizes a suit within three years. A contention was made in *Lindemann* v. *Rusk*, 125 Wis. 210, 229, that the power extended by the statute for three years was to enable the corporation to wind up its affairs, was exclusive of any other right or remedy for that purpose, and that debts due it or owing by it were extinguished at the end of that period. The court said (p. 230) "If these propositions are well founded, the legal consequences are certainly weighty and far-reaching, and there should be no uncertainty in their application for the ascertainment of private property rights and of those of the state within their operation." It brushed aside the idea that all rights of action ended at the end of the three-year period

and held that the assets of the dissolved corporation are a trust fund which a court of equity would lay hold of and administer for the benefit of those entitled to it. This is in keeping with the generally accepted doctrine on the subject. See *Pabst case, supra; Lake Shore Railroad Co.* v. *Smith*, 173 U. S. 684, 698; *Meriwether* v. *Garrett*, 102 U. S. 472, 512; *Pewabic Min. Co.* v. *Mason*, 145 U. S. 349. It appears that in *Lindemann* v. *Rusk, supra*, the action was commenced within three years immediately following the date of dissolution of the corporation, "but was not prosecuted to final judgment until after this three-year period," and replying to a contention that the action abated at the expiration of the three-year period, the court says (p. 232): "No reason is advanced for this result except the suggestion above mentioned, that the corporation then became extinct and all interest in the claim to its property was forfeited, and that creditors and owners of the capital stock were remediless in the matter; but, as we have pointed out, such is not the result; nor is there anything in the nature of the suit to prevent its continuance and an adjudication and enforcement of these rights. The action is founded in equity." It would indeed be a strange doctrine that would enable the Government to defeat a meritorious claim by the mere postponement of trial of a suit legally brought within the three-year period. The appropriate method of asserting the right of those entitled to the fund would usually be through a receiver appointed by the court, and the question is whether there are proper parties before the court. If there are such there is no doubt that the suit may be properly prosecuted to judgment. The Wisconsin statute authorizes the directors to act for three years, with full power to settle the corporation's affairs but "subject to the power of any court of competent jurisdiction to make in any case a different provision." See *Lindemann* v. *Rusk, supra*, p. 231. Clearly, the right of action did not abate if there was a proper plaintiff before this court within the period prescribed by the statute of limitations applicable to this court. The resolution of the stockholders was not confined to a dissolution of the corporation but went further and declared "that the assets of the cor-

poration be turned over to E. M. Oberndorfer, liquidator, with directions to pay the debts and liabilities" and distribute the balance to those entitled to share therein. This action superseded the authority of the directors in that the stockholders themselves directed that the assets be turned over to the liquidator. That the claim against the Government was a part of the assets is unquestionable. The resolution is broad enough to constitute the liquidator an assignee for the benefit of creditors. It gave him, whether called liquidator, trustee, or assignee, the power and right to collect the claim of the corporation against the Government, and to that end he could maintain a suit. See *Hubbard* v. *Tod*, 171 U. S. 474, 498. If the corporation were dissolved it could sue or its name be used in the suit brought within the three-year period, and while the suit was still undisposed of the liquidator sought permission to continue the suit. He was accorded that right, but without prejudice to legal objections the defendant might present. The objections now urged are as heretofore stated. While this court can not appoint a receiver, it is quite clear that a court of equity would not allow the trust to fail for want of a trustee. See *Curran* v. *Arkansas*, 15 How. 304, 311. It seems unnecessary to remand the case for that purpose where it appears that the stockholders have designated a liquidator (whom we regard as an assignee) and thus allowing the case to proceed in his name no reason appears why this court may not so mould its judgment as to show that he sues for the use of the creditors and stockholders of the corporation. Judgment will be awarded accordingly. And it is so ordered.

Moss, *Judge;* Graham, *Judge;* and Booth, *Judge*, concur.

This case was originally decided January 9, 1928, and concluded with Finding XIV. On defendant's motion for new trial Finding XV was, by order of April 16, 1928, added as follows, with memorandum by Chief Justice Campbell:

XV. (a) The original petition in this case was filed December 16, 1921, in the name of L. Frank & Son Company, alleging a contract made in November, 1918. It was No. A–333 on the docket, and is made a part of this finding by reference.

(b) An amended petition was filed on February 6, 1922, in the name of L. Frank & Son Company, a corporation, which is made a part of this finding by reference. The defendant's motion filed March 30, 1922, to require that the petition be made more definite was overruled. The defendant's demurrer filed May 29, 1922, was overruled June 5, 1922.

(c) A second amended petition was filed October 18, 1922, in the name of L. Frank & Son Company, a corporation, which is made a part of this finding by reference. The defendant's demurrer to the same was overruled February 19, 1923.

(d) A third amended petition was filed in the name of L. Frank & Son Company, a corporation, on May 8, 1926, which is made a part of this finding by reference. After proof had been taken and filed defendant's motion for leave to file special plea in abatement was overruled.

(e) On December 18, 1926, a motion was filed asking the substitution of E. M. Oberndorfer as party plaintiff, which was objected to by defendant, and subsequently allowed. On March 5, 1927, a fourth amended petition was filed in the caption of which E. M. Oberndorfer appeared as party plaintiff. This petition is made a part of this finding by reference. The defendant's demurrer to this petition was overruled.

(f) On July 6, 1927, a fifth amended petition was filed, in the caption of which the plaintiff is styled "E. M. Oberndorfer as liquidator of L. Frank & Son Company." This petition is made a part of this finding by reference. The defendant's demurrer to this petition was overruled. The defendant's several demurrers to the amended petitions are made parts of these additional findings by reference.

MEMORANDUM BY CHIEF JUSTICE CAMPBELL

The defendant did not request in its original requests the special findings involved in its last motion. The making of them now is perhaps in the discretion of the court. See *Winton case*, 255 U. S. 373, 395. They involve findings as to matters in the record. The claim asserted by the corpora-

tion originally was well within the time allowed by the statute of limitations of six years. The amendment allowed the suit to be prosecuted by the liquidator of the dissolved corporation. The dissolution of the corporation gave a right to this liquidator or trustee to intervene and continue the suit in the interest of those entitled to the assets. See *Thomas' case*, 15 C. Cls. 335. It was there said, after a review of the cases (p. 346): "All recognize the propriety of granting such an amendment as is now sought for, when it is necessary to the furtherance of justice." "There was, therefore, enough in the original petition to give the court jurisdiction of the parties and of the subject matter, and there is enough by which to amend." *Thomas' case*, *supra*, page 348. In *Little's case*, 19 C. Cls. 323, 330, the court refused to hold "that the dead contractor's representative shall be turned out of this court, * * * if any way can be found to avoid it without illegality." See *Buck's case*, 25 C. Cls. 120, 122; *American Tobacco Company case*, 166 U. S. 468. The material facts of this case are undisputed. The Government seeks to interpose a defense of a very technical nature that, as applied to the facts, is utterly unsound.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.
GREEN, *Judge*, took no part in the decision of this case.

WALKER MANUFACTURING CO. v. THE UNITED STATES

[No. E-488. Decided April 16, 1928]

On the Proofs

Excise tax; sec. 900, revenue acts of 1918 and 1921; accessories for automobiles; lifting jacks.—Lifting jacks designed, manufactured, and sold for special use with automobiles, are accessories for automobiles and as such subject to the excise tax imposed by section 900 of the revenue acts of 1918 and 1921.

The Reporter's statement of the case:

Mr. Marvin Farrington for the plaintiff. *Mr. George R. Jackson* was on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a manufacturing corporation duly incorporated pursuant to the laws of the State of Wisconsin, with its principal office in Racine, in said State, and since 1910 a large part of its business has been the manufacture and sale of lifting jacks of various sizes and types.

II. By monthly payments beginning March, 1919, and ending with a payment in September, 1923, the plaintiff on the demand of the collector of internal revenue paid the United States the manufacturer's excise taxes in the sum of $101,-929.56 under section 900 (3) of the revenue acts of 1918 and 1921, on the sale of lifting jacks manufactured by the plaintiff, excepting only certain jacks having a wheel base, which the collector classified as garage equipment.

III. Prior to the year of 1910, the principal business of the plaintiff company had been the manufacture and sale of bolster springs for farm wagons. As the automobile and truck industry were developed and wagons were being replaced by trucks, and buggies were being replaced by automobiles, the plaintiff company found that there was a lesser demand for its products and began seeking other lines for manufacturing, upon which its business could be increased. In 1910 or 1911, when the tire industry was in its infancy, the plaintiff began the manufacture of a tire-saving jack for use in connection with automobiles and the purpose of which was to take the pressure off of the tires by raising the automobile from the ground when the automobile was standing in the garage. The plaintiff found a very ready market for that device and also found that there was a demand for lifting jacks of different types in connection with automobiles, and since that time its business has almost

exclusively been the development and manufacture of lifting jacks for automobiles.

IV. The lifting jacks of the type involved in this case are mechanical devices for the lifting of weights through the utilization of the lever principle. Each jack is a complete unit including a handle and axle and a lifting surface inclosed in a suitable container or base. The mechanical principles utilized in plaintiff's jacks have been known for many years and are described in a number of patents, some dating as far back as 77 years, all of which patents have expired. The jacks are a development of the old type of wagon jack. Automobiles and trucks are of such weight and construction as to require the use of a lifting jack or an equivalent device whenever it is necessary to raise any parts thereof from the ground. The particular types of lifting jacks manufactured and sold by the plaintiff, and upon the sale of which the excise tax involved in this case was levied, were designed, manufactured, and sold for use with automobiles. The jacks were constructed with such a distance between the base and the lifting head as ordinarily exists between the ground and an axle of an automobile. The lifting head was constructed to be conveniently applied to the axle of an automobile and to prevent the same from slipping from its position. The handles were of such length and so placed as to permit application of the power by the operator clear of the car. With the development of automobiles with less road clearance, plaintiff changed the design of its lifting jacks to meet the new requirements. The plaintiff is now manufacturing lifting jacks with a capacity ranging from 1 ton to 7½ tons, and although the jacks could be used and are used to some extent other than in conjunction with automobiles and trucks, it clearly appears that the plaintiff's lifting jacks which are the subject of this suit were particularly designed for automobile and truck use. An examination of several of the plaintiff's catalogs which were introduced by the plaintiff in evidence in this case disclosed the fact that, with possibly one or two exceptions, each jack described or illustrated in these several catalogues is particularly designed as an automobile jack or is described as a jack particularly fitted for use in connection with certain types of automobiles or trucks.

V. The purposes for which the jacks here in question can be used in connection with an automobile are exclusively in the repair of said automobile and they could not be used in any manner in connection with the operation of the automobile or truck. The lifting jacks manufactured by the plaintiff ranged in size from the small jack which could be conveniently carried in the automobile for emergency use to the large type of roll-a-car which could only be used in a garage. The lifting jacks manufactured by the plaintiff were sold by the plaintiff to manufacturers of automobiles and trucks who include jacks as a part of their standard equipment and to jobbers of automotive equipment and to heavy hardware jobbers who also handle automobile equipment, so that the business of the plaintiff is divided into two classes, one class being its equipment business and one class being its jobbing business. It is the endeavor of the plaintiff to keep that business divided as equally as possible.

VI. On October 9, 1923, the plaintiff filed a claim for refund of the taxes involved in this suit, totaling $101,929.56, with the collector of internal revenue for Milwaukee and on November 12, 1924, the Commissioner of Internal Revenue disallowed the claim *in toto*. No part of the total sum of $101,929.56 paid to the United States for these taxes has been repaid to the plaintiff.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

This is an action to recover an excise tax amounting to $101,929.56 paid by plaintiff on an article known as "lifting jacks," which plaintiff claims was illegally collected under the provisions of section 900 of the revenue act of 1918, 40 Stat. 1057, 1122, and section 900 of the act of 1921, 42 Stat. 227, 291. In each act it is provided that a tax shall be levied and collected upon the following articles:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in

connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

The sole question to be determined is whether or not the lifting jacks described in the record constitute a part or accessory of an automobile. The particular type of lifting jacks upon sale of which the excise tax was levied and collected was designed, manufactured, and sold for use with automobiles. The jacks were advertised in plaintiff's catalogs as automobile jacks. Only this class of jacks, so designated, has been subjected to the payment of the tax. No tax has been required on certain other types manufactured and sold by plaintiff. In Article 16 of the Treasury Regulations 47, "accessory" is defined as follows:

"An 'accessory' for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

"The term 'accessories' includes, for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, pressure gauges, and hydrometers.

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles, are not subject to tax as 'parts' or 'accessories.' Thus a wrench or other tool of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, designed, intended, advertised, or held out for use on an automobile as distinguished from garage or shop equipment, is taxable as part of the complete kit.

"A wrench or other tool of special design or construction primarily adapted for use in connection with automobiles is taxable.

"If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used

with an automobile, or to an automobile accessories dealer, would determine its taxability."

Plaintiff's contention is that under the interpretation of the statute, as expressed in the regulations, its product is exempt from the tax. It is urged, for instance, that inasmuch as lifting jacks can not be used in the *operation* of an automobile, that they do not add to the *utility* or *ornamentation* of the automobile, that they are not designed to be *attached to* or *used in connection* with automobiles, they should be exempt from the tax. The argument is unconvincing and unsound. The almost universal use for the article involved herein is demonstrated by the fact that lifting jacks constitute a part of the automobile equipment of a vast majority of automobile owners. A large part of plaintiff's business as a manufacturer is in the production and sale of lifting jacks of this type. During the period from February, 1919, to August, 1923, plaintiff's sales on this product, manufactured, advertised, and sold for use in connection with automobiles, amounted to $2,037,214.43. In varying forms, questions of this character, involving the construction of section 900, have been before this court. In the recent case of *Cole Storage Battery Company*, No. D–784, decided April 2, 1928, *ante*, p. 164, this court said in an opinion by Judge Booth: "We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery, and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue."

It is the opinion of the court that the tax in this case was properly collected. Plaintiff is not entitled to recover and its petition should be dismissed, and it is so ordered.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

HARRY R. CARROLL AND LOUIS D. CARROLL, PARTNERS TRADING UNDER THE FIRM NAME OF CARROLL ELECTRIC CO., v. THE UNITED STATES

[No. C-925. Decided April 16, 1928]

On the Proofs

Contract of sale; failure to deliver article in condition for test; return of same; mutual rescission.—Where the sale of an article is conditioned upon delivery and satisfactory test, the article is delivered in such condition that it can not be tested, instead of being repaired by the contractor is returned at its request and resold, upon such request the Government declares the contract of sale revoked and returns the amount deposited as guaranty of performance, which is accepted, and the contractor at no time makes an offer to replace the article, there is a mutual rescission of the contract, and the contractor can not recover for loss sustained in the transaction.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiffs. *King & King* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Harry R. Carroll and Louis D. Carroll were at all times involved in this suit copartners trading and doing business under the firm name of Carroll Electric Company.

II. In November of 1917 an advertisement published by the Acting Supervising Architect of the Treasury Department specified that—

"Sealed proposals will be opened at 2 p. m., November 26, 1917, in the office of the Custodian, U. S. Sanatorium, Ft. Stanton, New Mexico, for furnishing and delivering f. o. b. cars, Capitan, N. Mex., one 50 k. w., 2-wire, 110-volt, d. c., direct-connected electric generating equipment. Engine to be single cylinder, noncondensing, piston valve type, and generator must be capable of operating in parallel with a 40 k. w. Skinner engine. Bids are desired preferably for a new engine and generator, but a secondhand outfit in

first-class condition will be considered. Each bid is to be accompanied by a certified check in amount 10% of the bid, payable to the Treasurer of the United States. Time for delivery must be stated in proposal. Payment in full will be made after the electric generating unit is set on its foundation and tested out and demonstrated that it is in proper working condition and will parallel with the Skinner machine."

Under date of November 24, 1917, the Carroll Electric Company made the following telegraphic proposal:

"CUSTODIAN, UNITED STATES SANATORIUM,
"*Fort Stanton, New Mexico:*

"For proposals opened November twenty-sixth we offer generating equipment Harrisburg engine direct connected to Sprague generator fifty kilowatts one hundred twenty-five volts will parallel present set. Secondhand in guaranteed good condition. Our property located in Washington can be inspected here by the Supervising Architect Office; price fourteen hundred dollars f. o. b. cars Capitan, New Mexico. If interested wire our expense whereupon will wire deposit or mail certified check or deposit funds here to your credit to protect bid.

"THE CARROLL ELECTRIC COMPANY."

Following the telegram of November 24, 1917, the plaintiffs addressed a letter to the defendant under date of November 26, 1917, confirming the telegraphic bid.

Under date of December 14, 1917, the proposal was accepted by the Assistant Secretary of the Treasury, as follows:

"THE CARROLL ELECTRIC CO.,
"*714 12th St., Washington, D. C.*

"GENTLEMEN: By and with the approval of the department, your proposal of the 26th ultimo is hereby accepted, in the amount of $1,400.00, the lowest of three received for furnishing and delivering f. o. b. cars Capitan, New Mexico, for Ft. Stanton Sanatorium, one secondhand 50 k. w. electric generating equipment capable of operating in parallel with a 40 k. w. Skinner engine now in place. This acceptance is made with the understanding that this machine must be properly cleaned of rust and painted with white lead and oil, or other rust preventative, before shipment, and that such shunt be furnished for installation as may be necessary for the proper operation of this set in parallel

with the generating set in place; you to obtain from the custodian or the manufacturer such data as may be necessary to enable you to manufacture this shunt.

"After the shunt is furnished and the machinery properly cleaned and painted, as described, advise the Office of the Supervising Architect in order that a representative of the office may be detailed to inspect the machinery again prior to shipment; the machinery to be ready for this inspection within five days from date of this acceptance.

*   *   *   *   *

"Your certified check will be deposited and the proceeds held until the satisfactory completion of the work.

"Respectfully,

"J. H. NAGLE, *Assistant Secretary*."

A copy of this letter is made Exhibit B to the petition and is made a part of this finding by reference.

III. The 50 kw. electric generating equipment thus undertaken to be furnished had been in operation in one of the leading hotels of Washington, District of Columbia, and at the time of the submission of the plaintiffs' bid was in storage. Subsequent to the making of award of December 14, 1917, the Treasury Department sent one of its mechanical equipment inspectors to the warehouse in Washington where the equipment was stored to ascertain whether the machinery was properly prepared for shipment. The inspector who made the examination reported that the equipment had not been properly cleaned, and that certain of the parts had not been properly protected with white lead and linseed oil. The plaintiffs were then advised that the cleaning and painting of the machinery would have to be completed, and that when that had been done another inspection would be made. On the occasion of the second inspection it was found that all of the parts had been thoroughly cleaned and painted and in proper condition for shipment. At the time the second inspection was made the equipment was on skids ready to be crated. The flywheel had been removed. The inspections were not made with a view to determining whether any defects existed in the machinery which would prevent its proper functioning. Such a determination could not have been made without erecting the machinery with steam connected and the electrical unit connected to a switch-

board with a measuring apparatus to indicate whether the generator was operating.

IV. On December 22, 1917, a letter was written by the Treasury Department to the plaintiffs, which letter was in part as follows:

"Reference is made to department letter of the 14th instant accepting your proposal, in amount $1,400.00, for furnishing and delivering f. o. b. cars Capitan, N. Mex., for Fort Stanton Sanatorium, one secondhand 50 kw. electric generating equipment capable of operating in parallel with a 40 kw. Skinner engine now in place, which acceptance was made with the understanding that the machinery would be properly cleaned by you and that another inspection would be made of same by a representative of this office before forwarding it from Washington.

"As said inspection has been made, you are now directed to ship the apparatus, routing same after it reaches El Paso, Tex., via the El Paso and Northeastern Railway, and marking same for the Custodian, Fort Stanton Sanatorium, Capitan, New Mexico.

Following the receipt of that letter the plaintiffs caused the machinery to be packed and crated, and on January 11, 1918, it was shipped in accordance with the instructions of the Treasury Department and with freight charges prepaid.

Under date of December 28, 1917, the Treasury Department addressed a letter to the plaintiffs containing the following language:

"The machinery will be installed promptly upon its receipt at destination, and payment will be made as soon as it is determined that the apparatus is satisfactory."

On or about the 4th day of January, 1918, plaintiffs addressed a communication to the person who had been engaged to pack or crate this machinery, in which it was said:

"Referring to engine and generator packed for us for shipment, please note that the box containing the parts is altogether too light for the purpose and this material should be packed in a heavier and stronger box; also, there should be more protecting crating on the shaft and flywheel at the point where the large electric wires are located."

Instructions were also sent as to the shipment and bill of lading.

Reporter's Statement of the Case

V. There was some delay in the delivery of the equipment by the railroad, but it was finally delivered at Capitan, New Mexico, at some time between the 4th of March and the 25th of March, 1918, and it was received by the Government without any notation being made on the bill of lading indicating any injury to the equipment in the course of shipment.

The plaintiffs were required by the letter which they received from the Secretary of the Treasury under date of December 14, 1917, accepting their proposal of November 24, 1917, a copy of which letter is Exhibit B to the petition, to furnish for installation such "shunt" as would be necessary for the proper operation of the set in parallel with the generating set in place. The shunt required was a metal alloy which would act as a compensator with electric currents flowing in the field circuit of the dynamo, and the use of a shunt with the equipment offered by the plaintiffs was necessary for the reason that the Sprague dynamo already installed at the hospital possessed field characteristics differing from those prevailing in the Harrisburg unit, and the effect of the shunt would be to adjust those differences. In their reply to this letter of December 14, the plaintiffs advised the department that the Harrisburg unit offered had been cleaned and painted and was ready for boxing and shipping, and asked instructions. They added: "We do not understand your acceptance to require that shipment of this unit be delayed until the shunt suggested is provided." Under date of December 22, 1917, the department gave the shipping instructions requested by the plaintiffs after the inspection had been made at Washington, and relative to "shunt" stated: "When the compensating shunt is ready, forward same immediately to the custodian by express and advise this office and the custodian in regard to the shipment." It does not appear that the shunt was ever shipped or delivered.

On December 15, 1917, the plaintiffs requested the custodian at the Fort Stanton Sanatorium to send them by return mail a copy of all the information appearing on the name plate attached to the dynamo driven by the Skinner engine; that is, the number of the dynamo, its type, size,

speed, voltage, amperes, etc. On December 21, 1917, that desired information was furnished to the plaintiffs.

VI. The machinery while crated was inspected aboard car at Capitan, New Mexico, and was not further inspected until after its arrival at the sanatorium, a few miles distant. It was unloaded from the car and hauled to its destination, over a smooth dirt road, in good condition without rough places, on which was one hill and the road over this hill was smooth and free from rough places.

On April 3, 1918, the Treasury Department notified the plaintiffs that the custodian at Fort Stanton had reported that some of the spokes of the flywheel were completely broken, and claim was made upon plaintiffs for the immediate replacement of the broken flywheel. On April 6 plaintiffs wired Fort Stanton that they would ask the manufacturer to ship a new flywheel upon receipt by them of the number appearing on the engine. The plaintiffs got in touch with the factory to get a new flywheel and were informed that they would have to ship the armature crank shaft and old wheel back. Nothing more appears to have been done toward getting a new flywheel.

On March 8, 1918, plaintiffs notified the Treasury Department that they were entering claim against the railroad company for the breakage of the flywheel and asked for a statement that the same was in apparently good order when shipped, and the department replied that the inspection which had taken place before shipment had not reported any breaks on the flywheel. The plaintiffs afterwards made a request on the surgeon in charge at Fort Stanton for an affidavit showing that the wheel was received from the railroad company in a damaged condition. He replied on April 29, 1918, that owing to the manner in which the unit was crated it was not possible to note the defects when the engine was inspected aboard car at Capitan and that the breaks in the spokes of the flywheel, together with a number of other defects, were discovered only after the engine had been hauled to Fort Stanton and inspected.

VII. The Government caused two complete inspections of the machinery to be made at Fort Stanton. One was made on May 2, 1918, and a second one on June 6, 1918. A num-

ber of defects were disclosed by those inspections. On July 17, 1918, the Assistant Secretary of the Treasury mailed to plaintiffs a copy of the June 6th inspection report. The letter in which the report was inclosed was, in part, as follows:

"The defects reported are considered so serious as to preclude satisfactory operation of the unit, as required by the contract.

"If you so desire, the apparatus delivered may be shipped back to the manufacturers and rebuilt in such fashion as to obviate all defects and render apparatus in strict accordance with the contract, without additional expense to the Government. If you do not desire to render the apparatus satisfactory as suggested, then same is hereby rejected.

"It is requested that you advise the department immediately as to what action you will take in the matter, or what disposition is to be made of the apparatus."

It does not appear that the equipment was ever installed.

On August 3, 1918, the plaintiffs wrote to the defendant relative to a reshipment of the equipment which the Treasury Department found to be not fitted for its use, and on August 9, 1918, the Treasury Department acknowledged receipt of plaintiffs' letter of August 3, "relative to a reshipment of the secondhand engine and generator which was found to be not fitted for our uses," and informed the plaintiffs that although it would be possible for the station to prepare the unit for shipment it could not arrange for its transportation from Fort Stanton to El Capitan, or for its railroad transportation.

VIII. On November 4, 1918, the plaintiffs caused the equipment to be transported back to Capitan, New Mexico, and thence shipped by rail to Washington, D. C. On November 11, 1918, the plaintiffs wrote the Treasury Department as follows:

"Referring to the secondhand engine and generator which we sold your department some months ago for use at the sanatorium, Fort Stanton, New Mexico, which engine and generator were rejected by your office, you are advised that we have recarted [recrated] and reshipped this apparatus to us at Washington, where we have an immediate purchaser if we can secure quick transportation. You are therefore

earnestly requested to take this matter up with the railroads and use every effort to expedite delivery.

"Shipment originated at Capitan, New Mexico, on November 4th, with the El Paso and Southwestern System, and is consigned to the Carroll Electric Company, Washington, D. C., routed S. Rosa & R. I. St. Louis B. & O., and is in Erie car No. 88601. Shipment is moving as a carload lot, and we would thank you to assist us in this matter."

On December 4, 1918, the department wrote as follows:

"Reference is made to your contract, in amount $1,400.00, chargeable to appropriation 'Mechanical equipment for public buildings, 1918,' for furnishing and delivering f. o. b. cars Capitan, N. Mex., for Ft. Stanton Sanatorium, one secondhand 50 k. w. electric generating equipment, and to department letter of July 17, 1918, advising you of the rejection of the equipment if you do not desire to rebuild same in such fashion as to obviate all defects and render apparatus in strict accordance with the contract, without additional expense to the Government.

"Your communication of November 11, 1918, indicates that no action will be taken by you in regard to making the apparatus satisfactory, and the contract is therefore hereby revoked.

"A copy of this letter will be sent to the custodian of the building for his information."

To this letter plaintiffs replied, on December 5, 1918, as follows:

"Your letter of December 4th regarding the cancellation of contract in the sum of $1,400.00, charged to 'Appropriation for mechanical equipment for public buildings, 1918,' received.

"This equipment was made useless by breakage in transit, a condition over which we had no control, and on account of such defect apparatus was rejected some time ago and is now in transit back to us in Washington.

"We would respectfully request that you return to us the certified check which we deposited as a guarantee of the faithful performance of this operation."

And in compliance with this request, the Treasury Department wrote to the United States Railroad Administration on November 15, 1918, requesting that the delivery of the equipment in Washington be expedited. The original call for proposals required, among other things, that each bid

should be accompanied by certified check in amount of 10 per cent of the bid. The plaintiff furnished such a check in the sum of $140, and it was the return of this check that was requested in the letter of December 5, 1918. The check was returned to the plaintiffs. After the arrival of the equipment at Washington, it was sold by the plaintiffs for the sum of $700, which was the best price then obtainable. It was installed for a local company in Washington without additional repairs being made except that the flywheel was replaced with a new one. The plaintiffs paid the return freight charges from Capitan, New Mexico, to Washington, D. C., in the amount of $464.74, $44 for drayage from station to storage point in Washington, and $35 for storage from date returned to date resold.

IX. There was some correspondence between the plaintiffs and the Government in the early part of 1918 concerning a claim which the plaintiffs desired to enter and did enter against the transportation company arising out of the breakage of the flywheel. Following that correspondence there was no further correspondence until July 15, 1922, on which date the plaintiffs addressed a letter to the Treasury Department in which it presented a claim of $1,731.74 as its expense in connection with the preparation of the equipment for shipment and transportation from Fort Stanton back to Washington and its loss of anticipated profit, as well as an interest charge in the amount of $388. On October 19, 1922, the claim was disallowed by the Comptroller General, and on April 2, 1923, the claim was reviewed by the Comptroller General and the decision of October 19, 1922, was sustained.

The court decided that plaintiffs were not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The Treasury Department having called for bids for furnishing designated electrical equipment to be used in connection with other electrical machinery at the sanatorium, Fort Stanton, New Mexico, the plaintiffs made a proposal to supply same for $1,400. Their bid was accepted upon

conditions stated in the letter of acceptance. They shipped the machinery and after its arrival at destination it was found upon inspection to have defects which, except in one particular, need not be detailed. This exception is that the flywheel, or some of its spokes, was broken. The plaintiffs sought to supply another flywheel but found it would be necessary to ship a part of the machinery back to the manufacturer. They were called upon to determine what course would be pursued and decided to have the machinery returned to Washington. They had it transported to the railroad station and reshipped by rail to themselves at Washington, where they sold it for $700, having supplied a new flywheel. They sue to recover the balance of the contract price, $700, besides about $600, the expenses incurred in reshipment and storage. Taking issue with the plaintiffs' contention, the Government also insists that the contract was rescinded.

The plaintiffs refer to the familiar rule applicable where a vendee does not take and pay for personal property sold, in which case the vendor may store the property and sue for the price, or may sell it and recover the difference between the contract price and the market price of the property sold or may keep the property and recover the difference between its market price at the time and place of delivery and the contract price. These are remedies accruing to a vendor in possession where the vendee refuses or fails to accept. But this rule does not account for the claim asserted of the expense incident to the reshipment and storage of the electrical machinery, including the broken flywheel. Nor standing alone does this rule account for the vendors having retaken possession of the property after its delivery if it was so delivered. The plaintiffs also cite and rely upon a line of cases in this and other courts where a contract with the Government provides for final inspection before shipment, or, as stated in the contract in a case involving wagons, "when finished, painted, and accepted by an officer or agent of the quartermaster's department and delivered as herein agreed, they shall be paid for," that in such case, the inspection provided for in the contract being had, the Government was bound to pay. See *Brown's case*, 1 C. Cls. 307;

Kerchner case, 7 C. Cls. 579; *Finney case*, 32 C. Cls. 546; *Electric Fireproofing Co. case*, 39 C. Cls. 307. In another case, *United & Globe Rubber Mfg. Co.* v. *United States*, 51 C. Cls. 238, 248, this court said that where articles of merchandise "to be manufactured" and delivered under certain precise specifications and subjected to prescribed inspections and tests meet these specifications, inspections, and tests, and no complaint with respect thereto is made within a reasonable time after final delivery, the transaction under the contract should be regarded as closed. If the plaintiffs sold to the Government the electrical machinery under agreement that the same should be finally inspected at Washington and when so inspected and approved it should be shipped and delivered f. o. b. cars at a distant point, and it was so delivered in good condition, the case would be brought within the decisions mentioned. But such is not this case.

There was an advertisement calling for proposals to be opened in the office of the custodian of the U. S. Sanatorium, Fort Stanton, New Mexico, for furnishing and delivering f. o. b. cars Capitan, New Mexico, a specified "direct connected electric generating equipment" that would be "capable of operating in parallel with a 40 kw. Skinner engine." While the preference was expressed for a new engine and generator, the advertisement stated that "a second-hand outfit in first-class condition" would be considered, and that payment would be made after the electric generating unit was set on its foundations, tested out, and demonstrated to be in proper working order and "will parallel with the Skinner machine." The plaintiffs' proposal offered certain generating equipment, being a "Harrisburg engine direct connected to Sprague generator" that would "parallel present set," and being "second-hand in guaranteed good condition." This proposal also stated that the property was located in Washington, where it could be inspected by the Supervising Architect's Office. Under date of December 14, 1917, the plaintiffs' proposal was accepted in a letter, which stated that the acceptance was made upon the understanding that the machinery would be cleaned of rust and painted with white lead and

oil before shipment and that such "shunt" would be furnished for installation as would be necessary for the "proper operation of this set in parallel with the generating set in place." It further stated that the custodian of the sanatorium would be furnished a copy of the letter and requested "on satisfactory installation of the equipment in accordance with specification requirements" to pay for same by voucher. The plaintiffs, having deposited their certified check in accordance with the call for proposals, it was stated that the same would be deposited and the proceeds held "until the satisfactory completion of the work." An inspector was sent to the warehouse where the equipment was stored to ascertain whether it was properly prepared for shipment. He reported and plaintiffs were informed that certain cleaning and painting should be done and another inspection made, and upon this second inspection the inspector reported the parts were in proper condition for shipment. The equipment was packed and crated by plaintiffs' agents and went forward to Capitan. It is very clear from this recital of undisputed facts that this is not the case simply of a sale of personal property to be delivered at a stated place. The property was indeed to be delivered "f. o. b. cars Capitan," but it was to be property of a definite description, intended for a specified use, and adapted to a named purpose and use. It was not to be paid for until by test it was demonstrated to be in "proper working condition" and that it would "parallel with the Skinner machine." The inspection at Washington could not make this demonstration and was not intended or understood to be final. The finding is that these two inspections were not made with a view of determining whether any defects existed in the machinery which would prevent its proper functioning, which could not be determined until the machinery was erected with steam connection "and the electrical unit connected to a switchboard with a measuring apparatus to indicate whether the generator was operating." When the inspection was made at Washington the equipment was on skids ready to be crated. The flywheel had been removed. Not only, therefore, did the terms of the contract inform plaintiffs of what they were undertaking and what was required of them as a

compliance with the contract, but their subsequent action confirms the fact that they fully understood the nature of their undertaking. When, after considerable delay in transportation, the shipment arrived at Capitan it could only be examined in its crated condition. It was not until it had been unloaded from the car and transported several miles over a dirt road that it was uncrated and carefully inspected. The report of the inspection to which it was then subjected is very full, the different parts having been carefully examined. We do not emphasize these, because the machinery was known to be secondhand when the proposal was accepted. But there were broken spokes in the flywheel and certainly the defendant could not be expected to connect the machinery with that in operation, to test the Harrisburg engine "in parallel with the Skinner engine" and take chances on what might occur by the use of a broken flywheel. Readily, plaintiffs undertook to replace the flywheel. In order to do this it was found that the manufacturer required the shipment of the armature crank shaft and the old flywheel. This apparently was determined to be impractical. A claim was made by plaintiffs against the carrier on account of the flywheel. After considerable correspondence they were informed that the defects disclosed were so serious as to preclude satisfactory operation of the unit in accordance with the contract and they were afforded the option of shipping back the machinery to the manufacturer to have it comply with the contract requirements or submitting to a rejection and were requested to inform the department what action they would take. The entire machinery was prepared for its return at plaintiffs' request and in November it was reshipped by plaintiffs to themselves at Washington. They informed the department of this and requested it to use its efforts with the railroads to expedite delivery. Replying to this letter relative to reshipment, the department wrote on December 4 that the letter indicated that no action would be taken by plaintiffs to make the apparatus satisfactory and "the contract is therefore hereby revoked." There was no claim while the equipment was still at the sanatorium that plaintiffs had done all their contract required. There was no demand that the equipment be installed and

tested or the broken flywheel be used. To the contrary, the plaintiffs wrote in reply to the department's letter of December 4, "this equipment was made useless by breakage in transit, a condition over which we had no control and on account of such defect apparatus was rejected some time ago and is now in transit back to us in Washington." "Of course, if it was accepted by them without protest, this was a complete rescission of the contract and plaintiff would have no right of action." *Warder* v. *Pischer*, 110 Wis. 363, 366. Accepting this situation they requested the return of their certified check "deposited as a guarantee of the faithful performance of this operation." This request was complied with. Afterwards the plaintiffs sold the equipment for $700, but a new flywheel was used upon it. It worked satisfactorily but whether it would have met the tests required by the contract or could operate in parallel with a Skinner engine does not appear. Moreover, there is an entire absence of proof that any "shunt" was sent at any time. The findings show that the use of a shunt was necessary because the Sprague dynamo already installed at the hospital "possessed field characteristics differing from those prevailing in the Harrisburg unit and the effect of the shunt would be to adjust those differences." If the equipment had been installed and upon trial had failed to do what the contract contemplated it could not be said that any obligation to pay for it existed. Payment was to be made when the equipment met the prescribed conditions. The receipt of the goods at the railroad station was not an acceptance of property in them. See *Philadelphia Whiting Co.* v. *Detroit White Lead Works*, 58 Mich. 29; *McNeal* v. *Braun*, 53 N. J. L. 617. The plaintiff's contention, however, is that the Government was bound to keep the property or at any rate to pay the contract price for it, with the added cost of its transportation to Washington and storage. "We do not think that such is the law. When the subject matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the

existence of those qualities, being part of the description of the thing sold becomes essential to its identity and the vendee can not be obliged to receive and pay for a thing different from that for which he contracted." *Pope* v. *Allis*, 115 U. S. 363, 371. The contract in the instant case was more than an engagement to sell certain equipment and deliver it f. o. b. cars at Capitan. It was an engagement that this equipment would "possess certain qualities" in that it would parallel with another engine, and until this fact was ascertained it was not to be paid for. Aside from other defects developed on examination at the sanatorium, the broken flywheel and the absence of shunt excused the failure to make any test, even if the removal of the equipment by the plaintiffs had not led to a similar condition. The view we take of this contract seems to be the view the plaintiffs took of it as evidenced by their conduct. In addition to what has been said, it is significant that after reshipping the equipment to themselves in December, 1918, and so far exercising absolute dominion over it as to sell it in Washington, the plaintiffs made no effort to supply other equipment to the Government and waited nearly four years before making any claim on account of the contract. The suit in this court was begun more than five years after the equipment reached Capitan in 1918. This conduct, as well as the correspondence cited, shows an acquiescence by plaintiffs in the Government's position that is unexplainable on any other theory than that the contract was mutually rescinded. The law is settled that even after an acceptance which may transfer title the purchaser may, under the contract, have the right to rescind as for a condition subsequent if the article does not correspond with the specifications. *Delaware, Lackawanna & Western Railroad Co.* v. *United States*, 231 U. S. 363, 372. The conduct of both parties in the case justifies the conclusion that both of them assented to the rescission of the contract. *Florence Mining Company* v. *Brown*, 124 U. S. 385, 390. See also *Smith* v. *York Co.*, 58 N. J. L. 242, and *Dougherty* v. *Neville*, 186 N. Y. 578. The petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.
GREEN, *Judge*, took no part in the decision of this case.

EDGAR ESTATES CORPORATION v. THE UNITED STATES

[No. E-304. Decided April 16, 1928]

On the Proofs

Excise tax; sec. 1000(a), revenue act of 1918; carrying on or doing business; corporation organized for settling estate.—A corporation organized solely for the purpose of acquiring from residuary legatees the real and personal property devised and bequeathed to them and liquidating the same, and so conducting its affairs, is carrying on or doing business within the meaning of section 1000(a), revenue act of 1918, and is subject to the special excise tax thereby imposed.

The Reporter's statement of the case:

Mr. Blaine Mallan for the plaintiff. *Mr. John T. Kennedy* was on the brief.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. A certain Mrs. Jane E. Edgar, a citizen of the United States and a resident of the city of New Rochelle, in the State of New York, died testate on or about the 12th day of March, 1895, seized and possessed of certain real and personal estate, which she disposed of by the terms of her last will and testament duly probated and admitted to record in the surrogate's court of Westchester County, in the State of New York.

II. By the terms of said will Mrs. Jane E. Edgar, after making certain specific bequests and creating certain trusts, devised and bequeathed the remainder and residue of her estate, real and personal, to three trustees, to be held in trust for the benefit of her two children, and further provided that upon the death of the survivor of these said two children the said remainder and residue of her estate should be divided by her said trustees in the following manner and proportions:

One-quarter to her cousin, Robert T. Emmet.

One-quarter to her grandniece, Helen V. C. Emmet.

One-quarter to the children of Newbold L. R. Edgar.

One-quarter to the children of William Edgar.

III. The survivor of Mrs. Jane E. Edgar's two children died in June, 1917, and the trustees of her estate attempted to devise plans for the distribution of the assets of the real estate among the residuary devisees and legatees, but found themselves unable to do so without recourse to partition suits, which would have been detrimental in result to the best interests of the residuary estate.

IV. Thereupon the plaintiff corporation was organized under the laws of the State of New York on the 7th day of September, 1917, with a capitalization of sixty thousand dollars ($60,000.00), divided into six hundred (600) shares of common stock of the par value of one hundred dollars ($100.00) per share.

V. The certificate of incorporation stated the objects and purposes of the corporation to be:

"To acquire from the residuary legatees and hold all the real and personal property devised and bequeathed to said residuary legatees under the will of Jane E. Edgar, deceased, and to sell, transfer, mortgage, assign, exchange, and otherwise dispose of any and all of the real and personal property aforesaid, upon such terms as to the board of directors may seem proper, and to receive the proceeds thereof and to distribute the same among the stockholders, after payment of expenses, and to lease and rent the said real property for any term or terms whatsoever, and to receive the rents and income derived from said real and personal property, and to distribute the same among the said stockholders after payment of expenses. To alter, improve, reconstruct, repair, and otherwise manage and maintain the said real and personal property, and generally to do and perform any and all other things which may be at any time necessary or convenient in the judgment of the board of directors, for the proper maintenance and upkeep of the said real and personal property acquired by the corporation as aforesaid."

VI. Upon completion of its organization the plaintiff corporation, pursuant to the provisions of its charter, acquired from the residuary devisees the following real estate:

No. 110 East 39th Street, New York City.

Corner of Mangin and Delancey Streets, New York City.
No. 76 Greenwich Street, New York City.
No. 68 West Street, New York City.
No. 104 Washington Street, New York City.
Premises known as Mount Tom, New Rochelle, New York, unimproved.
No. 415 Pelham Road, New Rochelle, New York, improved.
No. 407 Pelham Road, New Rochelle, New York, improved.

VII. Having acquired the aforesaid real estate from the said residuary devisees, the plaintiff corporation held the same until sold, such sales being made on the dates following:

March, 1919, 110 East 39th Street, which was a private residence.

May, 1919, Mangin and Delancey Streets, which was a five-story brick tenement.

December, 1919, 76 Greenwich Street, which consisted of a store and lofts.

December, 1919, 68 West Street, which consisted of a store on the ground floor, the upper portion being used for lodging purposes.

March, 1920, 104 Washington Street, which consisted of a store and lofts.

August, 1920, Mount Tom property, unimproved.

November, 1920, 415 Pelham Road, which was a private residence and considerable vacant land.

April, 1922, 407 Pelham Road, which was a private residence and considerable vacant land which was sold for a golf course.

The proceeds of said sales were distributed to the residuary devisees.

VIII. Plaintiff corporation, in some instances, sold certain pieces of said real estate under contracts by the terms of which the entire payment was made and received in cash. These cash proceeds were immediately distributed to the parties entitled thereto.

IX. In other instances the best terms procurable by the plaintiff corporation in its efforts to sell said real estate were part cash and balance in notes, secured by purchase-money mortgages. In transactions of this sort the cash was imme-

diately distributed, and the plaintiff corporation held the notes where said notes, by reason of their terms, were payable in installments. These installment payments, as and when collected and received by plaintiff corporation, were distributed.

X. From September 7, 1917, the date of its incorporation, and October 11, 1917, the date of its acquisition of the real estate from the residuary devisees, as hereinbefore set forth, until April, 1922, the date of the sale of the last piece of real estate so acquired, a little over four years, the plaintiff corporation acted in strict compliance with the terms of its charter. Rents were collected and the properties were managed generally, having in view their maintenance and preservation. The prior trustees had leased the properties, with one exception, for periods from three to five years, which leases were not renewed in any case, after acquisition by the corporation, for a longer period than one year. The plaintiff did not invest or reinvest the proceeds of the sales of properties, nor buy and sell securities for profit except in the three instances, to wit:

I. September 28, 1920, purchased $7,500.00 U. S. Victory 4¾%, $7,284.17. October 2, 1920, sale, $7,500.00 U. S. Victory 4¾%, $7,344.82. Profit, $60.65.

II. October 21, 1920, purchased $3,000.00 Cuban-American sugar 6's, $3,047.50. January 4, 1921, sale, $3,000.00 Cuban-American sugar 6's, $3,090.00. Profit, $42.50.

III. October 21, 1920, purchased $4,000.00 Sears, Roebuck Co. 7's, $3,975.78. October 15, 1921, sale, $4,000.00 Sears, Roebuck Co. 7's, $4,000.00. Profit, $24.22.

Plaintiff made only such repairs to the properties held by it as were necessary to preserve the property itself and prevent deterioration; it was operated and managed by one individual, a lawyer actively engaged in the practice of his profession in addition to his managerial and operative duties to the plaintiff corporation, which duties consumed only a small part of his whole time.

XI. On the 30th day of September, 1918, plaintiff corporation, pursuant to section 3173, Revised Statutes, and other acts of Congress made and provided, made to the Com-

missioner of Internal Revenue its return, on Official Form No. 707, for the year ending June 30, 1918, for special excise tax on corporations imposed by section 407, Title IV, of the revenue act of September 8, 1916. Said return showed that a fair average value of its capital stock for the preceding year was five hundred forty-three thousand seven hundred ninety-four dollars and twenty-one cents ($543,794.21), and that the tax due thereon was two hundred twenty-two dollars ($222.00). This tax was paid by plaintiff corporation on March 1, 1919. On December 22, 1919, plaintiff corporation paid the sum of three hundred sixteen dollars ($316.00) additional capital-stock tax for the year ending June 30, 1919. Again, on February 24, 1921, plaintiff corporation paid to the collector of internal revenue capital-stock tax imposed by section 1000, Title X, revenue act of 1918, in the respective sums of five hundred and forty dollars ($540.00) and four hundred forty-nine dollars ($449.00) for the taxable years ended June 30, 1920, and June 30, 1921, respectively. Again, on April 29, 1922, plaintiff corporation paid its capital-stock tax for the taxable year ended June 30, 1922, in the sum of four hundred and two dollars ($402.00). The total capital-stock taxes paid by plaintiff corporation for the years 1918, 1919, 1920, 1921, and 1922 are one thousand nine hundred twenty-nine dollars ($1,929.00).

XII. On or about August 3, 1922, plaintiff corporation, pursuant to section 3220, Revised Statutes, as amended by the revenue act of 1918, and reenacted by section 1315 of the revenue act of 1921, filed with the Treasury Department, Bureau of Internal Revenue, Official Form 843, a claim for refund of said sum of one thousand nine hundred and twenty-nine dollars ($1,929.00) alleged to have been collected in error.

XIII. Said claim for refund was rejected by the Commissioner of Internal Revenue on May 1, 1923.

XIV. All profits as such derived from the sale of said real estate were returned as income for the taxable year during which the particular property was sold, and the income tax thereon was paid in every instance.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff contends for an exemption from corporate tax liability, which the Commissioner of Internal Revenue refused to grant. The amount involved is $1,929.00. The tax was imposed and collected by the commissioner under section 1000 of the revenue act of 1918 (40 Stat. 1126), reading as follows:

"SECTION 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the revenue act of 1916 (1) every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * * (c) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30, * * *."

The tax was collected for the years 1918, 1919, 1920, 1921, and 1922. A refund claim was denied.

The plaintiff corporation was organized under the laws of the State of New York on September 7, 1917, with a capital stock of $60,000.00, divided into 600 shares of common stock of the par value of $100 per share. The certificate of incorporation in the following language states its objects and purposes, viz:

"To acquire from the residuary legatees and hold all the real and personal property devised and bequeathed to said residuary legatees under the will of Jane E. Edgar, deceased, and to sell, transfer, mortgage, assign, exchange, and otherwise dispose of any and all of the real and personal property aforesaid, upon such terms as to the board of directors may seem proper, and to receive the proceeds thereof and to distribute the same among the stockholders, after payment of expenses, and to lease and rent the said real property for any term or terms whatsoever, and to receive the rents and income derived from said real and personal property, and to distribute the same among the said stockholders after payment of expenses. To alter, improve, reconstruct, repair, and otherwise manage and maintain the said real and per-

sonal property, and generally to do and perform any and all other things which may be at any time necessary or convenient, in the judgment of the board of directors, for the proper maintenance and upkeep of the said real and personal property acquired by the corporation as aforesaid."

The facts agreed upon disclose that Mrs. Jane E. Edgar, a citizen of New York, died testate on March 12, 1895, leaving an estate made up of various parcels of valuable real estate and some personal property. The last will of the decedent, after making certain specific bequests, devised and bequeathed the residue of her estate, in trust for the use and benefit of her two children for life, with a provision that upon the death of the survivor the estate should pass in fee to certain named legatees and devisees. The survivor of Mrs. Edgar's two children died in June, 1917, and the estate descended as mentioned above. In September following, the plaintiff corporation was organized for the express purpose of acquiring from the aforesaid legatees and devisees the property they inherited as above, and thus administering the estate in what the incorporators regarded as a much more advantageous and profitable way than to pursue the established laws for the administration of deceased persons' estates in the Probate Court of New York. The corporation continued in existence from its organization until April, 1922. During its continuance eight separate parcels of realty came under its management and control, rents were collected, repairs were made, and the property managed and controlled in such a way as to obtain for it the most advantageous price. When sales were made—in some instances for all cash, in others, part cash and mortgages for balance—the cash received was immediately distributed to the stockholders and the mortgages were held by the corporation. Uniformly, when installment payments were received upon mortgages the funds were at once distributed. In September, 1920, a profit of $60.65 was realized from the purchase and sale of certain Victory bonds, and two stock transactions in the same year yielded a total profit of $66.72. The corporation was under the exclusive management of one man, a practicing lawyer, and its overhead expense was nominal. The

record shows that the trustees under Mrs. Edgar's will had leased all the realty, except one parcel, and these leases extended from three to five years from date. The corporation did not renew the leases upon the expiration of the term. The plaintiff, relying upon the above state of facts, insists that the corporation was not "carrying on or doing business" during the period of its existence, within the meaning and intent of the taxing act, and hence is entitled to judgment for the amount of the capital-stock taxes paid.

The nature of the capital-stock tax is obvious. It is, as settled by judicial decision too familiar to cite, an excise tax imposed upon the privilege of doing business as a corporation. The plaintiff in this case was prompted to incorporate in view of a situation wherein incorporation offered, at least in the opinion of the stockholders, a distinct advantage and profit over the ordinary course of law applicable to their situation. The corporation came into existence, manifestly, because it enabled the stockholders, the residuary legatees and devisees of Mrs. Edgar's will, to conserve an estate of considerable proportions, curtail expenses, and provide for expeditious management and disposition in a way and by a method superior to the established laws of the State respecting the administration of deceased persons' estates and the sale and division of realty owned by tenants in common. To accomplish the desired end indispensably entailed the customary proceedings involved in the sale of land and personal property. Rents were to be collected, some funds of the corporation were invested, and while the detail of activities resembles a process of liquidation, it is to be remembered that that is precisely the purpose of the incorporation, its one object to the discharge of which all business activities were solely directed. The corporation came into being to manage, control, and dispose of this estate; it had no purpose to continue longer, and while so engaged did carry on and complete all the necessary business activities for which it was distinctly incorporated. Surely this was a privilege. Clearly it was the exercise of a legal option to take from the channels of ordinary and customary legal procedure a considerable estate in lands and personal property,

Opinion of the Court

erect a legal entity, and thereby accrue an advantage which ownership in common did not afford those entitled to the property. The fact that overhead expense was nominal, proven profits from investments small, and business activities not especially exacting, in nowise militates against the rule. If the corporation was pursuing the object for which it was organized and doing all the essential things to accomplish that object, it can not claim a classification of an inactive corporation, doing no more than liquidating its assets. It is not the amount of business done which signifies, although in this case it is apparent that the corporation did conserve and save to the estate expenses which otherwise it would have incurred, and likewise enabled the stockholders to await a propitious moment for sales of real estate, as well as enable the corporation to collect rents, maintain the property, and make small investments. To do all this we think compelled a degree of business activity within the meaning of the revenue law.

The cases reflecting the various phases of controversies similar to the one in suit are found in the following citations: *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; *McCoach* v. *Minehill Railroad Co.*, 228 U. S. 295; *Chevrolet Motor Co.* v. *United States*, decided by this court November 7, 1927, 64 C. Cls. 211; *Edwards* v. *Chile Copper Co.*, 270 U. S. 452; *Conhaim Holding Co.* v. *Willcuts*, D. C. Minn., August 10, 1927, 21 Fed. (2d) 91, a case strikingly similar to the one in suit.

The petition will be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

MASON & HANGER CO. v. THE UNITED STATES

[No. D-543. Decided April 16, 1928]

On the Proofs

Contract; bond for performance; premium part of cost.—See *Mason & Hanger Co. case*, 56 C. Cls. 238; 260 U. S. 323.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the brief.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The report of the commissioner is as follows:

I. Plaintiff is a corporation organized under the laws of West Virginia with its office and place of business in the city of Richmond, State of Kentucky.

II. On September 14, 1917, plaintiff entered into a contract with the United States represented by Lieutenant Colonel C. G. Edgar, Signal Corps, U. S. Army, for the construction and completion of an aviation training camp near Lake Charles, La., known as Gerstner Field. Copy of said contract is annexed to the petition herein as Exhibit A and is by reference made a part of this finding.

III. The contract was in the cost-plus form, the contractor to be reimbursed the cost of the work as therein defined, including the cost of such bonds, fire, liability, and other insurance as the contracting officer might approve or require. Article 9 of the contract required that "the contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the contracting officer, in the sum of two hundred ninety thousand ($290,000.00) dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor."

IV. Upon the requirement and with the approval of the contracting officer the contractor furnished a performance bond in the penal sum of $290,000 and paid the actual neces-

sary costs thereof, amounting to $2,900, and upon the approval thereof by the contracting officer was reimbursed the amount of such cost as a part of the cost of the work, together with the agreed fee thereon amounting to $203.00, $3,103.00 in all.

In final settlement of the contract there was deducted from $8,270.70 on account of construction of the camp at Gerstner Field under contract dated September 14, 1917, the sum of $3,103, as representing reimbursement for cost of the bond and premium thereon previously paid the contractor, and there was paid plaintiff the difference, $5,585.52. This was done on a voucher number 59, which recites that it is "in full discharge of claims aggregating $9,714.21 referred to in formal release executed by the contractor under date of October 4, 1919, and filed with partial payment number 103. These claims represented items disallowed by Government auditors, and are now approved in part for payment as proper charges under the contract by the Board of Contract Adjustment, as per their report and recommendation attached, less payment of premium on surety bonds. $3,103."

The report of the Board of Contract Adjustment, with recommendation attached, referred to in this quotation above from voucher 59, is not in evidence. The defendant in this answer to the petition has made a counterclaim for the $5,585.52, paid on this voucher number 59. There is forwarded from the General Accounting Office copy of a certificate of settlement dated December 21, 1923, made by the General Accounting Office in favor of plaintiff covering reimbursement of $3,103 on cost of premium on bond plus fee thereon, but accompanied by a statement that said certificate was never transmitted to the Treasury Department for payment.

The court decided that plaintiff was entitled to recover $3,103.00.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The plaintiff's claim of $3,103, arising out of the expense incurred in furnishing the bond required by the con-

tract and the agreed fee, is uncontested in amount and is clearly allowable. See *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *Hurley-Mason Company case*, 62 C. Cls. 105. Admitting this item, however, the defendant interposes a counterclaim in which the item above mentioned is conceded, but it is alleged that the plaintiff has been overpaid on account of other items set forth in the counterclaim. There is a report of facts by a commissioner to which there is no exception. It appears that the plaintiff, after the contracting officer had refused to approve certain items of expenditure made by the plaintiff under its "cost-plus" contract, submitted its claims under the contract to the Secretary of War. The Board of Contract Adjustment was one of the agencies used by the Secretary of War and organized under General Order No. 103 to represent the Secretary in making the examination of contracts such as the one in this case. This board made an elaborate report upon the claim in question. See vol. 2, Decisions Board of Contract Adjustment, p. 780. The items in question were allowed in a less sum than claimed by the plaintiff and a voucher was authorized in the sum of $8,270.70, in full settlement of the disputed items. The contract authorized an appeal to the Secretary of War and made his decision final. The action of the board was his action. This provision has been frequently construed. See *Kihlberg case*, 97 U. S. 398, 401; *Brinck case*, 53 C. Cls. 170, 177.

There was, however, deducted from the amount so ascertained the item now claimed and only the balance was paid. We find no authority for withholding the cost of premium on the bond as already stated. The plaintiff is therefore entitled to judgment. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.
GREEN, *Judge*, took no part in the decision of this case.

YANKTON SIOUX TRIBE OF INDIANS v. THE UNITED STATES [1]

[No. D-546. Decided April 16. 1928]

On the Proofs

Eminent domain; taking of Pipestone Reservation; just compensation.—The market value of the Pipestone Reservation as of the date of taking by the United States, ascertained and allowed, together with interest.

The Reporter's statement of the case:

Mr. Jennings C. Wise for the plaintiffs. *Munn, Anderson & Munn* were on the briefs.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I, II, III. [Same as in *Yankton Sioux Tribe* v. *United States*, 61 C. Cls. 40.]

IV. By the act of February 16, 1891, 26 Stat. 764, the Secretary of the Interior was directed to cause to be established in each of the States of Wisconsin, Michigan, and Minnesota an Indian industrial training school. Section II of said act reads as follows:

"That the Secretary of the Interior may select any part or portion of the nonmineral public domain of the United States in either of said States which he may deem necessary and suitable, not exceeding 640 acres, and may, by appropriate order in that behalf, made and recorded in the General Land Office, perpetually withdraw such land from sale and entry and dedicate the same to use as a site for such industrial or training school; and if such portion of the public domain is not found available or suitably located, then the Secretary of the Interior may secure title by purchase, condemnation, or otherwise of a tract of land not less than two hundred acres for each of said schools, and upon the site thus selected, acquired, or purchased the Secretary of the Interior shall cause to be erected such buildings and improvements as may in his judgment be best adapted to the purposes in view: *Provided*, That the site for said build-

[1] Certiorari denied.

ings in the various States shall be as follows: In Minnesota, on the Pipestone Reservation. * * *."

V. In February of 1891 representatives of the Secretary of the Interior went onto and took charge of the Pipestone Reservation, and defendant then and there took the said reservation and remained in possession thereof continuously thereafter subject to the easement described in Finding II, *supra*.

VI. Subsequent to the passage of the act of February 16, 1891, Daniel Dorchester, superintendent of Indian schools, was instructed by the Commissioner of Indian Affairs to visit the Pipestone Reservation and to "recommend the specific site" for the erection of buildings at that locality for an Indian school. The superintendent visited the reservation on April 6, 1891, and on the following day reported to the commissioner the site which he had selected, and he recommended "that the buildings be erected out of the beautiful stone abounding in this vicinity, and that plans, specifications, advertising, bids, etc., be hurried forward at the earliest possible date."

VII. The first school building was erected in 1892 and was opened in February of 1893. Between 1892 and 1899 numerous improvements were made on the reservation at an aggregate cost to the United States of $48,624.75. Those improvements were as follows:

Girls' (main) building, erected 1892, cost	$21, 840. 00
School building, erected 1899, cost	11, 480. 00
Miscellaneous outbuildings, such as chicken house, cattle sheds, horse sheds, etc., erected 1892 to 1897, cost	2, 441. 00
Laundry and boiler house, erected 1892–3, cost	1, 543. 75
Water system, erected 1892, cost	4, 000. 00
Heating system, erected 1892–9, cost	2, 000. 00
Fencing, four miles, erected 1892, cost	320. 00
Roads and walks, constructed 1892–9, cost	5, 000. 00
Total	48, 624. 75

The school has at all times been conducted as a nontribal school.

VIII. The market value of the Pipestone Reservation in February, 1891, taking into consideration its value for graz-

ing and agricultural purposes, the value of its mineral rights, and its historical value, was $100,000.

The court decided that plaintiffs were entitled to recover as just compensation for the taking of the Pipestone Reservation $100,000, with interest from March 1, 1891, until paid.

Moss, *Judge*, delivered the opinion of the court:

Section 22 of the Indian appropriation act of April 4, 1910, 36 Stat. 269, 284, conferred jurisdiction upon the Court of Claims "to hear and report a finding of fact, as between the United States and the Yankton Tribe of Indians of South Dakota, as to the interest, title, ownership, and right of possession of said tribe," to a tract of land lying in the State of Minnesota embracing what is known as the Red Pipestone Quarries. In accordance with this authority the court reported findings of fact to Congress. 53 C. Cls. 67.

By act of June 3, 1920, 41 Stat. 738, Congress conferred jurisdiction upon the same court to adjudicate all claims of the Sioux Indians against the United States. Under that act plaintiffs instituted this action for the recovery of just compensation as will hereinafter be discussed. After the institution of the suit Congress more definitely conferred upon this court jurisdiction to determine from the findings of fact theretofore made "the interest, title, ownership, and right of possession of the Yankton Band of Santee Sioux Indians in and to the land known as the 'Red Pipestone Querries.'" 43 Stat. 730. This court made an additional finding to the effect that the Indians had always been and were still permitted to visit and procure stone from the quarries and would continue to have that privilege as long as they might desire; and upon the theory that the only interest possessed by the Indians was this right, the court dismissed the petition. 61 C. Cls. 40. The judgment dismissing the petition was reversed by the United States Supreme Court, 272 U. S. 351, 359, that court holding "That the United States has taken and holds possession of the entire quarry tract of 648 acres * * * and since the Indians are the

owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain."

By an act of Congress of date February 16, 1891, 26 Stat. 764, the Secretary of the Interior was authorized and directed to establish in each of the States of Wisconsin, Michigan, and Minnesota an Indian industrial training school. The land involved in this action was selected as the site for the establishment of the school in the State of Minnesota, and same was taken over by the Government in the latter part of February, 1891.

The sole question for determination in this case is the fair market value of the property taken as of the latter part of February, 1891.

The Red Pipestone Quarries from the earliest times have held an important place in the tribal life of the American Indian. This locality was, through unnumbered generations, the scene of periodical conferences of American Indians of all tribes. It was reverently regarded by the Indians as, perhaps, the most important single locality in Indian legend and lore. As they gathered here in vast numbers from far and near, all animosities and enmities were, for the time, forgotten in a great convention of peace. Here they procured the unique material, not found elsewhere, for the production of the peace pipe and other sacred symbols, and discussed questions affecting intertribal relations. It has been memorialized in literature and has furnished the theme for a rich heritage of quaint legend and tradition. The historic interest attaching to this property has at all times been considered by the Government as a proper element of value in its negotiations with plaintiffs. It is reflected in the evidence adduced on plaintiffs' behalf in this action. It is an element that is difficult of measurement. Plaintiffs earnestly insist that under the evidence this property was of the value of not less than $200,000 at the time of the taking. The tract in question is composed of about 240 acres of farming lands, 160 acres of grazing lands, the remainder of 248 acres being stone lands, including the quarries, which are confined to an area of something less than one square mile. It appears from the record that in 1897, six years after the taking, Con-

gress directed the Secretary of the Interior to negotiate with the Indians for the purchase of the land. The negotiations which followed resulted in an agreement between the Indians and representatives of the Government for the transfer of the title to the land by the Indians to the United States for the sum of $100,000. This agreement was transmitted to Congress and referred to the Senate Committee on Indian Affairs. A majority of the committee reported adversely, and no further action seems to have been taken. At another period the Government offered $75,000 for the property, which offer was rejected. A substantial portion of this offer was based on historic value. It should be remembered that under proper regulations plaintiffs are secure and will always remain secure in their rights and privileges in connection with the use of the Pipestone Quarry. The court has reached the conclusion, after a full consideration of all the evidence, that the fair market value of the property involved herein in the latter part of February, 1891, was $100,000. Plaintiffs are entitled to recover that sum with interest, and it is so ordered and adjudged.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

OTIS BEEMAN v. THE UNITED STATES

[No. D-129. Decided April 16, 1928]

On the Proofs

Navy pay; commission without compliance with statute; service as de facto *officer; suit for pay of commissioned officer.*—The commission of a seaman as an ensign, provisional rank, U. S. Naval Reserve Force, without compliance with the act of August 29, 1916, requiring examination and recommendation by a board of naval officers and examination by medical officers for physical fitness, was invalid, and pay appertaining to such rank can not be recovered notwithstanding the services performed were those of an ensign with designation as such.

Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Cornelius H. Bull* and *King & King* were on the briefs.

Mr. J. J. Lenihan, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Frank J. Keating* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff enrolled as a seaman, second class, U. S. N. R. F.-4, on April 17, 1917, and reported for active duty the next day. Thereafter, while serving at the enlisted rating, he was detailed to duty involving actual flying in aircraft at the Naval Air Station at Pensacola, Fla.

While at Pensacola under this detail of duty, on February 11, 1918, he was assigned and commissioned the provisional rank of ensign, United States Naval Reserve Force-5. He accepted the appointment, executed the oath of office on February 15, 1918, and on the same date was appointed naval aviator by the commanding officer of the Naval Air Station at Pensacola and detailed to duty involving actual flying in aircraft including dirigibles, balloons, and airplanes. This appointment was approved by the Acting Chief of the Bureau of Navigation, Navy Department, February 20, 1918.

II. On February 18, 1918, an order was issued to plaintiff detaching him from duty at the naval air station, Pensacola, Fla., and assigning him to duty with the United States naval aviation forces in France. This order was delivered to the plaintiff and he was detached February 26, 1918.

He left Pensacola on February 26 and reported, as ordered, to the commander of the United States naval aviation forces, at Paris, France, April 4, 1918, and on that date he was further ordered to proceed to a station outside of Paris and report to the commanding officer of the United States naval station at that place, Moutchic-Lacanan (Gironde). He reported there on April 8, and from that date to December 13, 1918, was detailed to duty involving actual flying in aircraft at different aviation stations in France and England.

III. On December 13, 1918, plaintiff received an order detaching him from the northern bombing group, France,

and from such other duties as had been assigned him, and directing him to proceed to Bordeaux, France, and report to the naval port officer at that place for further transportation to the United States, and upon arrival in the United States to report to the Bureau of Navigation. The order stated that his designation as a naval aviator "remains in effect."

Plaintiff obeyed this order, proceeding first to Bordeaux and then to the United States, and arrived at his home in Chicago on January 11, 1919.

IV. By an order dated February 18, 1919, plaintiff was directed to proceed to Cleveland, Ohio, and report to the officer in charge of the Navy recruiting station for temporary duty, physical examination, and to have his health and service records closed. Pursuant to this order he reported at said station on February 25, 1919, and was "examined, found physically qualified, and detached."

V. At the time of plaintiff's provisional appointment to the rank of ensign he had not been examined nor recommended for such appointment by a board of naval officers, nor had he been found physically qualified by a board of medical officers, as required by the act of August 29, 1916, 39 Stat. 556, 587.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff was enrolled as a seaman, second class, United States Naval Reserve Force, on April 17, 1917, and entered upon active duty the next day. Thereafter, while thus serving at the enlisted rating, he was detailed to duty involving actual flying in aircraft at the naval air station, Pensacola, Fla. While at Pensacola on this detail, on February 11, 1918, he was assigned and commissioned the provisional rank of ensign, United States Naval Reserve Force. He accepted the appointment and executed the oath of office on February 15, 1918, and on the same day was appointed naval aviator by the commanding officer at Pensacola and detailed to duty involving actual flying in aircraft. This appointment was

approved by the Acting Chief of the Bureau of Navigation, Navy Department, February 20, 1918.

On February 18, 1918, an order was issued detaching the plaintiff from duty at the naval station and assigning him to duty with the United States naval aviation forces in France. This order was delivered to plaintiff on February 26, 1918, and on that date he left Pensacola and reported to the commander of the United States naval aviation forces at Paris, France, on April 4, 1918. In France and England he was detailed to duty involving actual flying in aircraft at the different aviation stations.

On December 13, 1918, he was detached from the northern bombing group with which he was serving in France and ordered home. This order stated that his designation as a naval aviator remained in effect. The plaintiff in obedience to the order returned to the United States, arriving at his home in Chicago on January 11, 1919.

By an order dated February 18, 1919, plaintiff was directed to proceed to Cleveland, Ohio, and report to the officer in charge of the Navy recruiting station for temporary duty, physical examination, and for the closing of his health and service records. Pursuant to this order he reported at said station on February 25, 1919, was examined, found physically qualified, and was detached.

The question is whether his appointment to the provisional rank of ensign was valid under the statute and carried with it the pay of that rank.

Plaintiff relies upon the case of *Royer* v. *United States*, 59 C. Cls. 199, affirmed 268 U. S. 394. But that is not this case. That was a case where the officer serving as a *de facto*, not a *de jure*, officer had been paid for his services as such. In the suit he was suing for other and subsequent services as a *de jure* officer. The Government claimed a deduction on account of the sum previously paid him while acting as an officer *de facto*. The court passed upon the question of his right to retain the sum paid him as a *de facto* officer, and the Supreme Court held that the money having been paid for services actually rendered in an office *de facto*, and the Government having presumably benefited to the extent of the

payment, in equity and good conscience he should not be required to refund. *Badeau* v. *United States*, 130 U. S. 439, 452. See also *Montgomery* v. *United States*, 19 C. Cls. 370, 376; *Bennett* v. *United States*, *Id.* 379, 388, and *Palen* v. *United States*, *Id.* 389, 394.

In the *Royer case* the Supreme Court said:

"We need not determine whether the respondent might have maintained an action against the Government for unpaid salary."

That is now the question to be decided in this case. Here the plaintiff is seeking not to retain what has been paid him but to recover what he claims has not been paid him.

The pay claimed in this case is dependent upon the rank, the rank is dependent upon the validity of the appointment, and the power of appointment upon the meaning of the statute. The applicable statute is the act of August 29, 1916, 39 Stat. 556, 588, which provides that—

"No person shall be appointed or commissioned as an officer in any rank in any class in the Naval Reserve Force, or promoted to a higher rank therein, unless he shall have been examined and recommended for such appointment, commission, or promotion by a board of three naval officers not below the rank of lieutenant commander, nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war. * * *."

It does not appear that plaintiff was either physically examined by a medical board or examined otherwise or that his appointment was recommended by the designated board of three naval officers; and in the absence of proof of compliance with these requirements of the statute, it must be held that under the provisional appointment he was not entitled to the pay of an ensign, and, consequently, he is not entitled to recover here.

This view of the matter is sustained by the decision of this court in the case of *Lawless* v. *United States*, 59 C. Cls. 224. In that case the plaintiff on March 18, 1919, was given the provisional rank of lieutenant in the reserve force, to date from September 21, 1918. He accepted the appointment, executed the required oath, and served as a lieutenant.

The principle was also passed upon by this court in *Joshua Garrison, jr.*, v. *United States*, 59 C. Cls. 919, 923, which was a case of a naval aviator detailed for duty involving actual flying; he served in France and England, and on October 28, 1918, after he had been seriously injured, was sent to a hospital for treatment and afterwards retired on account of incapacity. While invested with the rank of ensign, and subsequent to his injury, he was given the provisional rank of lieutenant, junior grade, on March 3, 1919, to date from October 1, 1918. For a while in the settlement of his accounts he was paid the additional 50% provided for aviators by the act of March 3, 1915, 38 Stat. 939, but thereafter it was withheld, and he brought suit in this court to recover for the portion withheld. The court held that his promotion was not preceded by the statutory requirement of an examination and recommendation by a board of naval officers, and by a board of medical officers as to his physical qualifications, and that compliance with the statute in these particulars was necessary before he could be promoted to the rank of junior lieutenant; that as the requirements of the statute had not been complied with, his promotion to that rank was invalid, and he was not entitled to the pay of the rank. The court said:

"No such promotion could be made until after the same had been recommended by a board of three naval officers not below the rank of lieutenant commander, nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war. * * * it seems to us that his appointment as provisional lieutenant, junior grade, was clearly outside the statute and unwarranted under the law."

The court cited with approval the *Lawless case*, *supra*.

The plaintiff can not recover, and the petition should be dismissed. It is so ordered.

The counterclaim filed by defendant has been withdrawn.

GREEN, *Judge;* MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

MANTLE LAMP CO. OF AMERICA v. THE UNITED STATES

[No. E-361. Decided April 16, 1928]

On the Proofs

Excise tax; sec. 900(14), revenue act of 1918; heat-insulated jars; absence of vacuum.—Heat-insulated jars, manufactured by the plaintiff, using ground cork in place of a vacuum, *held* to be "thermostatic containers" and subject to the excise tax of section 900(14), revenue act of 1918.

The Reporter's statement of the case:

Mr. Marvin Farrington for the plaintiff. *Mr. W. H. F. Millar* was on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff herein, the Mantle Lamp Company of America, Inc., is and at the times hereinafter mentioned was an Illinois corporation, with its principal office in Chicago, engaged in the manufacture and sale of heat-insulated receptacles of the nonvacuum type. Said company has been engaged for many years in the manufacture and sale of other articles, such as lamps, radio equipment, etc., not involved in this controversy.

II. On or about the first day of May, 1919, the Commissioner of Internal Revenue, by and with the approval of the Acting Secretary of Treasury of the United States of America, promulgated and published Regulations 47 relating to excise taxes on sales by the manufacturer under section 900 of the said revenue act. Article 26 of said regulations reads as follows:

"ART. 26. Thermostatic containers.—The tax is five per centum of the manufacturer's selling price of the enumerated articles. The tax attaches only to the sale of containers using the vacuum principle of heat or cold retention. Thus fireless cookers are not taxable."

Reporter's Statement of the Case

III. In early January, 1920, plaintiff began the manufacture and sale of heat-insulated jars, vessels, or receptacles of the nonvacuum type. It was the first to successfully produce and place on the market a heat-insulated receptacle of the nonvacuum type, known as Aladdin Thermalware Jars. Plaintiff's jars were and are constructed with an inner earthenware container, which is surrounded with an outer metal jacket, spaced apart from the container approximately one inch. The two articles, the inner container and the outer jacket, are joined and sealed together at their upper extremity or necks. The one-inch space between the inner container and the outer metal jacket is packed with ground cork. The completed receptacle is provided with a bail, grip, glass stopper, and cap threaded to engage a threaded portion of the outer jacket and hold the stopper in position.

IV. The difference in insulating efficiency between the thermal conductivity of a vacuum and ground cork is at the ratio of 70 to 1.

V. On or about December 27, 1920, the Secretary of the Treasury of the United States approved amended regulations promulgated by the Acting Commissioner of Internal Revenue, the same being Regulations 47 (revised December, 1920), relating to the excise taxes on sales by the manufacturer under section 900 of the revenue act as set forth in Finding II hereof.

Article 26 of the said amended regulations reads as follows:

"ART. 26. Thermostatic containers.—The tax is five per centum of the manufacturer's selling price of the enumerated articles. All sales by manufacturers of thermostatic containers are taxable whether the property of thermostatic retention is obtained by insulation or by the vacuum principle. Fireless cookers, ovens, stoves, refrigerators, and like articles are not taxable under this section."

VI. Pursuant to demand by the collector of internal revenue the plaintiff, in July, 1921, prepared and filed returns showing the manufacture and sales of Aladdin Thermalware Jars for the period January 1, 1920, to June 1, 1921, in amount of $145,323.60. Thereafter the collector of internal revenue at Chicago, Ill., assessed a tax against the plaintiff

on said sales of $7,266.18, together with 5% penalties of $363.30 and interest in amount of $1,750.14, aggregating $9,379.62. This sum was paid to the said collector under date of January 31, 1923. On October 13, 1923, the plaintiff paid a further item of interest of $198.15 to the collector, and on April 21, 1924, a 25% penalty amounting to $1,457.71 and interest in the sum of $584.41, aggregating $2,042.12. All of the taxes, penalties, and interest were paid under protest after they had been duly assessed.

VII. On June 27, 1923, plaintiff filed a claim for refund of the $9,379.62 paid on January 31, 1923, which claim was rejected by the Commissioner of Internal Revenue on October 10, 1923. Claim for refund of the $2,042.12 paid on April 21, 1924, was filed September 30, 1925, and rejected on February 4, 1926. No claim for refund covering the $198.15 paid on October 13, 1923, was filed by the plaintiff.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

This tax case arises under sections 900 and 903 of Title IX of the revenue act of 1918, 40 Stat. 1057, 1122, as follows:

TITLE IX—EXCISE TAXES

" SEC. 900. That there shall be levied, assessed, collected, and paid upon the following article sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

*   *   *   *   *

"(14) Thermos and thermostatic bottles, carafes, jugs, or other thermostatic containers, five per centum. * * *

" SEC. 903. That every person liable for any tax imposed by section 900, 902, or 906 shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the Secretary, may by regulations prescribe.

" The tax shall, without assessment by the commissioner or notice from the collector, be due and payable to the collector

at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of five per centum, together with interest at the rate of one per centum for each full month, from the time when the tax became due."

The plaintiff manufactures and markets what it styles an "Aladdin Thermalware Jar." The vessel is composed of an "inner container, having a single wall surrounded by material resistant to heat conductivity (usually ground cork) and the whole is encased in a metal jacket, both containers being joined and sealed at the neck." It is apparently conceded that the only difference between the plaintiff's jar and the well-known thermos bottle is that in the latter thermostatic retention is obtained by the vacuum principle, whereas in plaintiff's jar thermostatic retention is obtained upon a non-vacuum principle. Both vessels are designed for the same purpose and both function in the same way. One may afford more and longer preservation of the contents than the other, but beyond question each is intended for the same demand and finds sale among exactly the same class of users.

Plaintiff seeks to restrict the language of the taxing act to a particular article described by a trade-mark term. We think this position is untenable. Congress was applying to this source of revenue a tax burden, a tax known as a luxury tax, and in so doing was using the well-established meaning and notoriously known article of commerce which, by reason of its peculiar construction, would maintain thermostatic retention of the contents put into the article.

We deem it unnecessary to indulge a technical discussion of the differences in construction between thermostatic containers. Congress was using the term in a generic sense and did not intend to exempt a mere change in form which served the same purpose.

The plaintiff's jar falls within the meaning and intent of the law, and we think the petition should be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

Reporter's Statement of the Case

MALLEABLE IRON RANGE CO v. THE UNITED STATES

[No. D-510. Decided April 16, 1928]

On the Proofs

Income tax; return on accrual basis; deduction for judgment debt affirmed after return.—In the year 1918 plaintiff, keeping its accounts on an accrual basis, set up as an accrued liability a judgment rendered against it during the year and from which it had appealed, with interest thereon to the end of the taxable year. In prosecuting the appeal plaintiff filed a supersedeas bond with United States bonds as security, staying execution of the judgment, which was increased and affirmed in 1920 by the appellate court. *Held*, that the amount so set up was properly accrued on the plaintiff's books in the year 1918, and was not subject to the income tax for that year. Interest on the judgment debt, likewise accrued on the books in 1919, was not exempt from taxation.

The Reporter's statement of the case:

Mr. J. G. Hardgrove for the plaintiff. *Miller, Mack & Fairchild* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The original judgment in this case was rendered June 14, 1926, 62 C. Cls. 425, and on certiorari the case was remanded by the Supreme Court April 11, 1927, 273 U. S. 674, for additional findings. On the remand the court below made special findings of fact, as follows:

I. At all of the times herein mentioned, the plaintiff, Malleable Iron Range Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and a citizen of said State, having its principal office and place of business at the city of Beaver Dam, in the eastern district of Wisconsin.

II. On and at all times since April 26, 1923, one A. H. Wilkinson, hereinafter referred to as the collector, was and now is the duly appointed, qualified, and acting collector of internal revenue for the eastern district of Wisconsin.

Reporter's Statement of the Case

III. On April 26, 1923, the said collector notified the plaintiff that a tax of $33,023.86 had been assessed against the plaintiff in respect to its income for the year 1918, and that a further additional tax of $925.89 had been assessed against the plaintiff in respect to its income for the year 1919, and demanded payment of said taxes, and threatened that if said taxes were not paid, penalties would be imposed upon the plaintiff and that as such collector he would collect said taxes and penalties by distraint of the plaintiff's property.

IV. Thereafter, and on May 7, 1923, the plaintiff, under protest and compulsion and not voluntarily and only for the purpose of avoiding the imposition of penalties, seizure, or prosecution, paid to the said collector the amount of said taxes, respectively, to wit, the sum of $33,023.86 for the year 1918 and the sum of $925.89 for the year 1919, notifying said collector at the time of such payments that it objected to said taxes and to each thereof, that the objection to the said taxes upon which said protest was based was "that there has been eliminated from the accrued liabilities of the undersigned a certain judgment entered January 15, 1918, against the undersigned by the District Court of the United States for the Eastern District of Wisconsin, because of the claim of your department that said judgment was a liability in the year 1920 and not in the year 1918; that if the amount of said judgment were allowed as a deductible liability in the year 1918, as heretofore treated by the undersigned in returns and claims heretofore filed, as under the revenue acts it should properly and legally be treated, no additional tax liability would be assessable against the undersigned, and that the payment of said additional tax is exacted under compulsion and illegally and under threat of the imposition of illegal, unjust, and oppressive penalties," and further notified said collector that the recovery of the amount of said taxes, and of each thereof, would be sought by all means available for that purpose.

V. The assessment of said taxes was made by the Deputy Commissioner of Internal Revenue on June 30, 1921. Thereafter the plaintiff objected thereto and requested a confer-

ence and duly presented its objections and the evidence in support thereof before the income-tax unit of the Internal Revenue Department for the purpose of showing cause why said tax should not have been assessed and should not be paid. On October 27, 1921, the plaintiff's objections were overruled by the deputy commissioner. On November 19, 1921, the plaintiff appealed to the Committee on Appeals and Review from said ruling and said appeal was thereafter duly heard. On February 21, 1923, the Committee on Appeals and Review recommended the disallowance of the plaintiff's claims, which recommendation was approved by the Commissioner of Internal Revenue. Demand for payment of said taxes having been made by said collector on April 26, 1923, requiring the making of such payment within 10 days thereafter, the plaintiff paid the taxes under protest, on May 7, 1923. Thereafter on August 23, 1923, the plaintiff filed with the collector of internal revenue of the said district in which said assessment had been made a claim for refund of the taxes so collected from it, which claim was rejected by the Deputy Commissioner of Internal Revenue on November 8, 1923.

VI. The said additional taxes of $33,023.86 for the year 1918 and $925.89 for the year 1919 were assessed as hereinafter more particularly shown.

On January 15, 1918, a decree was duly entered in the District Court of the United States for the Eastern District of Wisconsin in a cause there pending in which one Fred E. Lee, as administrator of the estate of one Arthur K. Beckwith, deceased, was plaintiff, and in which the plaintiff herein was defendant, finding and adjudging the plaintiff entitled to recover from the plaintiff herein the sum of $78,816.67 damages for certain patent infringements extending from April, 1905, to April, 1911, together with interest thereon at 6% from June 10, 1915, to January 15, 1918, and as punitive damages 20% of said $78,816.67, or $15,763.33, making a total of $106,862.26, together with costs taxed at $2,803.28, amounting in all to $109,665.54. On February 25, 1918, the plaintiff gave notice of appeal from said decree and an order was made in open court giving the defendant

10 days in which to file a petition for appeal and assignment of errors.

During the year 1918 and the succeeding years the plaintiff kept its books on the accrual basis and not on the cash basis. It set up on its books in the year 1918 as an accrued liability the said sum of $109,665.54, with interest at the rate of 6% per annum from the date of the entry of said decree to December 31, 1918, to wit, $6,305.77, or a total of $115,971.31.

On March 6, 1918, the plaintiff duly filed its petition for appeal from said decree to the United States Circuit Court of Appeals for the Seventh Circuit.

On March 6, 1918, the United States District Court for the Eastern District of Wisconsin entered an order in the case mentioned allowing an appeal and ordering a stay of execution, conditioned upon the furnishing of a supersedeas bond in the sum of $120,000. Before said order was entered, the parties stipulated for the acceptance of a bond executed by one Andrew G. Hill, one Fred W. Rogers, and one Silas McClure, as sureties, provided the plaintiff herein should cause to be deposited and kept undisposed of $135,000 par value of bonds of the United States pursuant to the agreement, a copy of which is attached to the petition. The agreement was executed by the plaintiff herein and by a trust company corporation organized under the laws of Wisconsin, under date of February 28, 1918, and the attorney for the plaintiff in said suit noted at the foot thereof his consent to the approval, without notice, of the bond executed by the plaintiff herein as principal and said Hill, Rogers, and McClure as sureties, upon the filing with the court of the receipt of said trust company showing the deposit of bonds pursuant to the agreement. In the agreement it was recited that the plaintiff herein had deposited with the trust company, in trust, $135,000 par value of second Liberty loan bonds, and it was agreed that the trust company should keep and hold said bonds and collect the interest therefrom as the same matured and add such interest to the principal sum of said bonds to be subject to the uses for which the said bonds were applicable, that if the United States Circuit Court of Appeals should wholly reverse said judgment and by its man-

date award or direct a decree in favor of the plaintiff herein and against the plaintiff in said suit, then the trust company should deliver all of said bonds, with accrued interest, to the plaintiff herein and be discharged from any further liability, but that if said judgment or decree should be affirmed, either in whole or in part, so that the same should be immediately payable and the liability of the plaintiff herein and said sureties upon said bond should become due and payable in all respects, then the trust company, upon the filing of the mandate of the court of appeals in the district court, and upon notice of such fact, should immediately sell or cause to be sold all or so many of said bonds as might be necessary and apply the proceeds thereof, or so much as might be necessary toward the entire satisfaction of the liability of the plaintiff upon such supersedeas bond, paying the surplus after deduction of its reasonable costs, expenses, and compensation to the plaintiff herein.

At the same time, the attorney for the plaintiff in said suit noted at the foot of the supersedeas bond his approval thereof. The agreement of February 25, 1918, and the supersedeas bond were filed on March 12, 1918.

Of the $135,000 of bonds so deposited, $60,000 in amount were loaned to the plaintiff herein by said Hill, Rogers, and McClure and the plaintiff herein executed an agreement to stand responsible and indebted to them therefor.

Thereafter, by proceedings duly had, said appeal was perfected and the cause heard in the circuit court of appeals, and, on March 15, 1920, said decree was by the circuit court of appeals modified by adding to the amount fixed therein interest on $78,816.67, at 6%, from April 18, 1911, to June 10, 1915, and as so modified affirmed. Thereafter pursuant to the mandate of the circuit court of appeals the district court modified its decree by providing that the amount of the recovery thereunder be increased by adding thereto the sum of $19,599.09, being the interest on the item of $78,816.67, at 6% from April 18, 1911, to June 10, 1915, making a total of $126,461.17, and by providing for the recovery by the plaintiff therein of the interest on the costs theretofore taxed and on the amount of the modified decree from January 15, 1918, making a total to March 15, 1920,

the date as of which said modified decree was entered, of $146,049.73.

The judgment was paid on March 22, 1920, the sum paid being $146,220.11, and the bonds deposited with the trust company under the agreement of February 28, 1918, were returned.

In making its return of income for the year 1918 the plaintiff deducted the amount of said alleged judgment debt represented by said decree of January 15, 1918, and the interest which had accrued thereon during the year 1918, and in making its return for the year 1919 deducted, among other things, the interest on said alleged judgment debt. In the assessment of the taxes hereinbefore mentioned the deductions so claimed by the plaintiff were disallowed and rejected. The disallowance and rejection of the deductions so claimed resulted in an increase in the plaintiff's net taxable income as determined by the Internal Revenue Department for the years 1918 and 1919. The additional taxes so assessed against the plaintiff for the years 1918 and 1919 are the amounts of the additional taxes assessed against said plaintiff for 1918 and 1919 by reason of the disallowance and rejection of the deductions aforesaid.

At the close of the year 1919, acting on advice of the attorneys who represented it in the cause in which the decree was entered, the plaintiff herein increased the liability on its books under the judgment or decree in question to $145,000, debiting reserve profit and crediting judgment re Fred E. Lee, etc., $29,028.67; but the only portion of the deduction here claimed is the interest accrued on the decree during the year 1919.

The court decided that plaintiff was entitled to recover, in part.

GRAHAM, *Judge*, delivered the opinion of the court:

This case has been heard heretofore by this court and a judgment entered dismissing the petition. Thereafter a certiorari was granted by the Supreme Court, and, before a hearing, the following order was entered by that court:

"The motion is granted, and the cause is remanded for additional findings by the Court of Claims from the evidence

already introduced before the Court of Claims in respect to the outlay in bonds or money required to be deposited by the petitioner herein in securing a stay of the execution of the judgment against the petitioner in the suit against it by the United States in the United States District Court for the Eastern District of Wisconsin and in the Circuit Court of Appeals for the Seventh Circuit."

The findings have been amended in compliance with that order.

It is to be assumed that the language "the suit against it by the United States in the United States District Court for the Eastern District of Wisconsin" refers to a suit against the plaintiff in that court by Fred E. Lee, administrator of the estate of Arthur K. Beckwith, as there is nothing in the record in regard to a suit in that court by the United States against plaintiff. There is a suit by Lee against plaintiff.

On January 15, 1918, the District Court for the Eastern District of Wisconsin entered a decree finding and adjudging the plaintiff therein entitled to a judgment of $109,665.54. On February 25, 1918, plaintiff here gave notice of an appeal, and on March 6, 1918, an order was entered allowing the appeal and ordering a stay of execution conditioned upon the furnishing of a supersedeas bond in the sum of $120,000. Before the entry of the decree plaintiff stipulated with third parties for the acceptance of a bond executed by it and said parties, provided plaintiff should cause to be deposited and kept undisposed of $135,000, par value, United States Liberty bonds. The agreement, copy of which is attached to the petition, was executed by plaintiff and a trust company, and the attorney for plaintiff in that suit noted on said agreement his consent to the approval of the bond, upon the filing with the court of the receipt of the trust company showing the deposit of the bonds.

The agreement with the trust company recited that plaintiff had deposited $135,000 in bonds and agreed that the trust company should keep and hold said bonds, collect the interest thereon as it matured, and add such interest to the principal of said bonds to be subject to the uses for which said bonds were applicable, and that if the United States Circuit Court of Appeals wholly reversed said judgment and awarded a

decree in favor of the plaintiff herein, then the trust company should deliver all of said bonds, with accrued interest, to the plaintiff, but that if said judgment should be affirmed, either in whole or in part, so that the same should be immediately payable and the liability of the plaintiff herein and the sureties on the bonds became due and payable in all respects, then the trust company, upon the filing of the mandate of the court of appeals in the district court, and upon notice of the fact, should immediately sell or cause to be sold all or so many of said bonds as might be necessary and apply the proceeds thereof, or so much as might be necessary, toward the entire satisfaction of the liability of the plaintiff upon said supersedeas bond, paying the surplus after deducting its reasonable costs, expenses, and compensation to the plaintiff.

On March 15, 1920, the decree of the lower court was modified by the circuit court of appeals by increasing the judgment to $126,461.17 and providing for the recovery by the plaintiff in that suit of this amount with interest on the costs theretofore taxed and on the amount of the modified decree from January 15, 1918, a total as of March 15, 1920, of $146,049.73, for which sum decree was entered. Plaintiff herein paid this judgment on March 22, 1920, in the sum of $146,220.11, and the bonds deposited with the trust company were returned to it.

The plaintiff accrued for the year 1918 on its books as a loss or expense the amount of this judgment with interest at the rate of 6% from the date of entry to December 31, 1918, a total of $115,971.31, and at the close of the year 1919, acting on the advice of the attorney who represented it in said suit, the plaintiff, in order to provide for any increase in the judgment, accrued on its books an additional sum of $29,028.67, making a total of $144,999.98.

The plaintiff made its return for 1918 on the accrued basis, and on April 26, 1923, the Commissioner of Internal Revenue refused to allow the sum thus accrued as a loss or expense, and assessed against plaintiff a tax of $33,023.86 in respect to its income for 1918. The commissioner also disallowed said accrual of $29,028.67 for the year 1919 and assessed an additional tax of $925.89 for that year. These two sums

were paid by plaintiff under protest, and it is to recover them that this suit is brought.

The additional findings, responsive to the order of the Supreme Court, show that there was an "outlay" of bonds amounting in 1918 to $135,000, which was more than the amount of the accrual for that year by the plaintiff. The question arises whether under the circumstances of this case this outlay was a proper accrual under the statute. The plaintiff kept its books on an accrual and not a cash basis. It could have paid this judgment and taken an appeal, or it could have put a sum of money in escrow sufficient to pay it, or it could have done what it did—pledge in trust United States bonds in a sum sufficient to guarantee the payment of the judgment should the judgment of the higher court be adverse. In any event it would seem that the result would be the same. Had it paid this judgment and taken an appeal, it would undoubtedly have been entitled to accrue the amount paid. Had it put the money in escrow, the same would be true. See *Becker Brothers* v. *United States*, 7 Fed. (2d) 3, 8, a case similar to this, where it was held that the amount of the judgment was accruable. While these bonds were not cash, they were the equivalent of, and readily convertible into, cash. As far as plaintiff is concerned its financial position was as much affected by the deposit of the bonds as it would have been by the deposit of the money. It could have sold the bonds and realized the cash, and in putting them in trust it destroyed their availability as an asset in its business as completely as if their value in cash had been withdrawn from its treasury.

We are of opinion that the accrual in the year 1918 for the deposit of the bonds was proper, and that plaintiff is entitled to recover the sum assessed against it for that year of $33,023.86.

As to the accrual of $29,028.67 for 1919 on the advice of its attorneys to meet a possible increase in the judgment on appeal, no facts had occurred in regard to this, within the knowledge of the plaintiff, to justify an accrual. It was merely a precautionary measure based upon no known fact, but upon a possibility, a speculation. We do not think that

this sum was accruable, and as to this plaintiff is not entitled to recover.

Judgment will be entered for plaintiff in the sum of $33,023.86, with interest from May 7, 1923, to date of judgment. It is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

JOHN A. SIZER, THOMAS A. JONES, AND WARREN GILMAN JONES, EXECUTORS OF THE LAST WILL OF WILLIAM A. JONES, DECEASED, v. THE UNITED STATES

[No. F-331. Decided April 16, 1928]

On the Proofs

Estate-transfer tax; gift inter vivos; *renunciation of bequest.*—The essentials of a valid gift *inter vivos* require more than intent, and where the alleged donor retains in his possession stock which it is his intent at some time to give to a donee, manifesting the intent by a written statement filed with the certificates of stock that the same belong to such donee and by endorsing them over, but without delivering thereto the key of the safety deposit box containing the certificates or informing him of the transfer so attempted, the circumstances do not show a transfer of title, and a renunciation by such donee of the bequest of said shares to him does not remove them from the burden of the Federal estate-transfer tax.

The Reporter's statement of the case:

Mr. George R. Jackson for the plaintiff. *Underwood, Smyser, Young & Basse* were on the briefs.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. William A. Jones was the president of the W. A. Jones Foundry and Machine Company. He owned over 800 shares of a total of 1,000 shares of the capital stock therein. War-

ren G. Jones is the son of William A. Jones. He entered the employment of the W. A. Jones Foundry and Machine Company in 1910. By 1915 he was an executive.

II. About 1913 to 1915 William A. Jones, being anxious to see his son make a success of the business, told him that if he did make a success of it he, the father, would see that Warren G. Jones was given a controlling interest in the business. About 1915 the father told Warren G. Jones that he would get a substantial part of the business before his death; that he would not have to wait to inherit it. This promise was made in good faith.

III. Warren G. Jones did make a success of the business and highly pleased his father. He exceeded his expectations in the way of managerial ability. Warren G. Jones had been in charge from about 1917, but William A. Jones continued as president until his death.

IV. William A. Jones intended to retain 600 shares of stock until his death and to give the balance of his holdings to Warren G. Jones before his death.

V. William A. Jones had made a will in 1916 in which he bequeathed 599 shares of the stock to Warren G. Jones.

VI. About Thanksgiving time, 1920, William A. Jones came to the office of his attorney, M. E. Leliter, and stated that he was about to leave for Florida and wished to attend to transferring the stock to Warren and that it was down at the bank. Mr. Jones and Mr. Leliter then proceeded to the bank. Mr. Jones' safety deposit box was opened. A number of certificates of stock was contained therein in various denominations. Mr. Jones instructed Mr. Leliter to sort out 288 shares and then instructed him to indorse them over to Warren, all of which was done. Mr. Jones then signed them. Mr. Jones then said, "Now, Warren can take the stock to Chicago with him or leave it here as he pleases." When the 288 shares were sorted out and indorsed they were put in a separate envelope and Mr. Leliter wrote, "288 shares of stock belonging to Warren Jones." Mr. William A. Jones then signed the slip or envelope on which this was written. Mr. Jones then directed Mr. Leliter to count over the rest of the stock in order to account for all the shares. Mr.

Leiter had a key to the deposit box at his office where it was at the disposal of Warren G. Jones.

VII. William A. Jones died on May 30, 1921, at the age of seventy-one. He left a will in which he bequeathed 599 shares of the capital stock of the William A. Jones Foundry and Machine Company to Warren G. Jones. The executors thereof are John A. Sizer, Thomas A. Jones, and Warren G. Jones, the plaintiffs herein.

VIII. Of the above bequest, Warren G. Jones filed a written waiver and renunciation of the benefits of the legacy mentioned in Finding VII to the extent of 288 shares of said stock, the amount and number involved in this case. He already owned one share, so that finally his total holdings after the renunciation amounted to 600 shares.

IX. The executors of the will of William A. Jones duly filed a return with the Commissioner of Internal Revenue disclosing the value of the estate for Federal inheritance taxes. An audit and review were made of the liability of the estate and the net taxable value thereof was increased by the sum of $176,472.00 by reason of the inclusion of the 288 shares of capital stock. As a result of this and other adjustments not here in issue an additional tax amounting to $20,221.49 was determined against the said estate, of which $11,223.62 arose from the inclusion of the transfer. On September 21, 1926, plaintiffs paid to the collector of internal revenue at Indianapolis, Ind., the sum of $11,223.62 and filed therewith a claim for refund for the sum of $11,223.62. On April 16, 1924, plaintiffs paid to the collector of internal revenue at Indianapolis, Ind., the sum of $11,223.62 and filed therewith a claim for refund for $9,633.17. Plaintiffs also filed an amended claim therefor on November 18, 1924. The claim for refund of $9,633.17 was rejected by the Commissioner of Internal Revenue by letter on November 4, 1924. Reconsideration of the decision was denied on May 24, 1926. The claim for refund of $11,223.62 was rejected by the Commissioner of Internal Revenue on October 26, 1927.

X. The decedent was 71 years old at his death. He had had diabetes for 20 years and some blood pressure and had been on a semidiet for 20 years, but despite this affliction was an energetic and active man up until a short time prior

to his death. The primary cause of his death was nephritis. He had had a stroke of paralysis at a time not far remote from the date of the alleged transfer, which does not seem to have caused his death. He was confined to his bed but one week. His mental condition was good.

XI. At the time of the transfer Mr. Jones was planning on future activities covering several years. He planned on nothing but life. He had invited a friend to visit him during the summer of 1921. He spent the last twenty years of his life in traveling, fishing, and hunting.

XII. The amount of tax involved in the transfer of the 288 shares of stock here in issue is $11,223.62.

The court decided that plaintiffs were not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

This is an estate tax case. The plaintiffs seek to recover $11,223.62 levied and collected by the Commissioner of Internal Revenue from the plaintiffs, executors of the estate of William A. Jones, deceased. The facts, about which there is no important dispute, involve the primary question of a gift *inter vivos*. The decedent, William A. Jones, was president and owner of 800 of the 1,000 outstanding shares of the capital stock of the William A. Jones Foundry and Machine Company, an Illinois corporation. Mr. Jones resided at La Porte, Indiana, and died there on May 30, 1921. The claim is now made that on Thanksgiving Day, 1920, Mr. Jones gave to his son, Warren Jones, 288 shares of stock in the above corporation of the value of $176,472.00. The executors of the estate did not include in their returns for the estate tax the value of said shares. The commissioner, after audit and review, did include the amount as part of decedent's estate, and assessed an additional tax thereon of the amount claimed in this case. No jurisdictional questions are involved.

The findings disclose that the decedent continued the active and dominating figure in the corporation up to about 1915. He was anxious to have his son, Warren Jones, succeed him and was doing all he could to arouse the son's interest in the business, as well as test his capacity to take it

over. He assured the son that if he successfully managed affairs it was his intention to give him a substantial interest in the business prior to his death and a controlling interest therein after that event. The son did succeed. The father made his last will in 1916 and bequeathed to the son 599 shares of stock in the corporation. This legacy, with the addition of one share then owned by the son, gave him 600 shares, more than a majority of the stock.

On Thanksgiving Day, 1920, some four years after the date of decedent's will, the decedent called upon his attorney and requested him to accompany decedent to a bank where he kept his safety deposit box wherein all his stock holdings in the corporation were contained, stating at the time that he was on the point of leaving for Florida and "wished to attend to transferring the stock to Warren." The decedent's lawyer segregated from his stock 288 shares thereof, and by the direction of the decedent indorsed the same over to his son Warren. The decedent signed each indorsement. Thereafter the 288 shares were placed in a separate envelope upon which, on a separate piece of paper attached to the envelope by rubbers, the lawyer wrote the following: "288 shares of stock belonging to Warren Jones." This indorsement the decedent also signed. The package was then replaced in the decedent's safety box and remained therein until his death. The lawyer retained a key to the box and it was available for use to Warren Jones. The lawyer knew no more of the transaction until the time came for the settlement of decedent's estate. Warren Jones did not take physical possession of the stock and no claim is made that he was present when the alleged gift was made. He did know of his father's intention to make such a gift and claimed only a total of 599 shares of stock, 311 from the estate and 288 from this alleged gift.

The plaintiffs insist that the gift was complete; that delivery was made either actually or constructively. There is a manifest intent to make at some time a gift of the stock to the son, but more than intent is essential to complete the transaction. The difficulty is one of delivery. At once from the record we are faced with the proposition of title, i. e., transfer of title. The stock certificates, though segre-

gated from others, never changed location. There was no time subsequent to the alleged transfer when the son may be said to have had dominion over them. As a matter of fact, the son seems to have been wholly ignorant of what did take place. It is evident that the father under the existing conditions retained the stock in his possession and might have sold it. If a question of ownership of the stock had developed between the father and son during the continuance of the *status quo*, the father undoubtedly would have been declared the owner; so that as between the parties we have little doubt that the gift was incomplete. The testimony of the attorney precludes the possibility of sustaining a contention that he accepted delivery of the stock as trustee for the donee. He was acting for the donor, and gave himself no concern whatever over the transaction after its completion at the bank.

The cases cited by the plaintiffs do not depart from the axiomatic rule as to the essentials of a gift *inter vivos*. They each one disclose clearly a delivery either to the donee, or someone acting for him. As stated in the brief: "Where the donor intended to give the bonds to the donee and placed within the power of the donee to obtain them and where the donee does in fact obtain them there is sufficient delivery." (Citing *Muir* v. *Gregory*, 168 Fed. 641.)

Unfortunately for the plaintiffs the donee in this case did not receive by delivery the key to the donor's safety deposit box, as illustrated in the case of *Hagemann* v. *Hagemann*, 204 Ill. 378.

We do not think it necessary to continue the discussion. It is an easy and far from cumbersome matter to make a valid gift of certificates of stock—one free from doubt and leaving no avenue open for adverse contentions. The donor in this case was a man of large business experience, he knew how to transfer corporate stock, and he and his son were upon amicable relations, and no reason appears of record why a departure from such a course was adopted. If the donor did not intend to retain dominion over the stock, and keep within his power the reserved right to exercise ownership over it if occasion demanded, he should have given it to the son outright and not resort to unusual and obscure

means which serve only to becloud the transaction and throw it open to injection of questions of doubt and conjecture.

The tax was assessed under section 402 of the revenue act of 1918, 40 Stat. 1057, 1097. This section and pertinent subdivisions read as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(*a*) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * *

"(*c*) To the extent of any interest therein of which the decedent has at any time made a transfer, * * * in contemplation of or intended to take effect in possession or enjoyment at or after his death * * * except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *"

The defendant raises the additional question of a transfer in contemplation of or intended to take effect in possession and enjoyment after death. The donor was at the time of the gift in somewhat the same situation as to his health which had prevailed for many years. He did not contemplate immediate demise; and in view of the terms of his will it would seem that the transaction was an arrangement of stock certificates in such a way that he might, if so inclined, complete it before his death, and thus accelerate a portion of the legacy left to the son in his will. In any event the donee would receive the gift, either through the will or prior to the donor's death.

The petition will be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

Syllabus

NEW YORK SHIPBUILDING CO. v. THE UNITED STATES

[No. E-201. Decided April 16, 1928]

On the Proofs

Contract for construction of battleship Idaho; *fixed price; suspension of eight-hour law; authorization of overtime work.*—Due to necessities of the war, work on a fixed-price contract for the construction of the battleship *Idaho* in excess of eight hours per day, the requirements of the eight-hour law having been suspended by the President, was urged upon the shipbuilder by the Secretary of the Navy with a statement that the increase of cost occasioned thereby would be taken up later. In compliance with the Secretary's request the shipbuilder employed overtime and by agreement the Government was at all times kept informed of the amount thereof. *Held*, that this, in light of the policy of the Navy Department showing an intention to make reimbursement in such cases, was evidence of an agreement to reimburse the contractor the excess cost of such overtime.

Same; increase in wages due to award of labor board.—Where a shipbuilder, having under construction in its yards ships for the Emergency Fleet Corporation under cost-plus contracts, on which it was required under an award of the Shipbuilding Labor Adjustment Board to pay increased wages, by reason thereof found it necessary to make corresponding increases in work on a fixed-price contract for the construction of a battleship, and was informed by the Secretary of the Navy that his department expected to pay unavoidable increases in cost due to adoption of the new wage scale, there was an agreement to reimburse the contractor such increases on the fixed-price contract.

Same; construction of vessel by other than original contractor; approval by Government; maintenance of suit.—Where the Government expressly approved an arrangement whereby the contractor sold and transferred all its assets and property to another corporation and agreed to hold in trust therefor its contract with the Government for the construction of a battleship, and in return said other corporation agreed to and did thereafter construct the vessel, suit for recovery under the contract can be maintained by the original contractor.

The Reporter's statement of the case:

Mr. Ernest G. Fifield for the plaintiff. *Messrs. Charles J. Fay* and *Frederick De C. Faust*, and *White & Case* and *Sherley, Faust & Wilson* were on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Charles F. Jones* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, New York Shipbuilding Company, is a corporation duly organized and existing under the laws of the State of New Jersey, having its principal place of business at Camden, New Jersey.

II. Under date of November 9, 1914, a contract in writing was entered into between the plaintiff and the United States of America whereby the plaintiff undertook and agreed to construct one first-class battleship known as Battleship No. 42 (the *Idaho*) in conformity with the drawings and specifications attached to said contract, including duly authorized changes; to be completed and ready for delivery on or before the expiration of 36 months from the date of said contract, for the sum of $7,250,000.00.

The plaintiff's triplicate copy was transmitted to it under date of November 24, 1914, and received by it the day following. Work commenced immediately.

A copy of said contract marked "Exhibit A" is annexed to the petition and is made a part of these findings by reference.

III. On November 10, 1916, the plaintiff entered into an agreement with the American International Corporation whereby it agreed to sell to the American International Corporation or its nominee, and the American International Corporation agreed to buy or procure its nominee to buy, all of the property and assets of the plaintiff; but as to the plaintiff's contract with the defendant *in re* the *Idaho*, it was agreed that the plaintiff should execute a declaration of trust whereby it was to hold its contracts and all benefits thereof in trust for the American International Corpora-

tion or its nominee, and the American International Corporation for itself or nominee agreed to assume, carry out, and perform the said contract. The transfer was to take place between November 30, 1916, and December 15, 1916.

The American International Corporation designated as its nominee the New York Shipbuilding Corporation, a corporation organized on or about November 29, 1916, under the laws of the State of New York, and hereinafter referred to as the "Corporation." Thereafter, pursuant to the agreement, the assets and property of the plaintiff were transferred to the Corporation, and as to its said contract with the defendant the plaintiff on December 12, 1916, executed the agreement, copy of which is annexed to the petition as "Exhibit B," and made a part of these findings by reference thereto, whereby the plaintiff agreed to hold the said contract and all benefits thereof exclusively in trust for the benefit of the Corporation, and the Corporation agreed to carry on and perform the said contract in all respects.

Thereafter the Corporation carried on the construction of the *Idaho*, and upon assuming the work made no substantial change in the managing personnel thereof. The value of plaintiff company's stock was reduced to $1.00 per share, and it maintained a nominal existence, i. e., its officers and directors held periodical meetings but no active work was done.

The Navy Department was duly notified of the foregoing change and under date of January 2, 1917, defendant's superintending constructor sent to the plaintiff copy of a letter by the Bureau of Construction and Repair which contained a quotation of a Navy Department indorsement. The bureau's letter is as follows:

"1. The bureau quotes below, for your information and action, the department's endorsement, reference (b) above:

"'The department is advised that the New York Shipbuilding Company, contractor for the *Idaho*, has become the New York Shipbuilding Corporation, but that fact will have no effect on the contract for the *Idaho*, and vouchers for payments on that vessel will be made as heretofore to the New York Shipbuilding Company.

"'Letters received from the corporation relative to the *Idaho* will, merely for the sake of convenience, be regarded

as official and given the same force and effect as letters heretofore received from the company relative to said vessel.' "

The superintending constructor's letter enclosing the above contained the following statement:

"2. I suggest that the New York Shipbuilding Company address a letter to this office, with copies for the bureau and the department, giving official information relative to the New York Shipbuilding Corporation being the agent for the New York Shipbuilding Company in completing the *Idaho*, or whatever may be the facts in this case, and requesting that the letters and other correspondence and official acts of the New York Shipbuilding Corporation and its representatives, relative to the *Idaho* and all work under the contract of that vessel, be regarded as the letters and acts of the New York Shipbuilding Company.

"I also ask that the letters requesting payments, together with the affidavits, be letters and affidavits from the New York Shipbuilding Company, signed by its authorized officials. The public bills and vouchers prepared in this office will be in favor of the New York Shipbuilding Company.

"This office proposes to address all letters, memoranda, and other correspondence and reports relative to the *Idaho*, and all work under the contract for that vessel, to the New York Shipbuilding Company."

The bills for installments due under the contract were rendered by the plaintiff, but payments by the defendant came in two ways, checks being made payable sometimes to the plaintiff and sometimes to the Corporation.

IV. Reports of progress on the work of constructing the *Idaho* were made at the end of each month by defendant's superintending constructor to the Bureau of Construction and Repair, and copies thereof were furnished to the contractor. In these reports the superintending constructor set forth the accrued delay and attributed some of it to strikes, insufficient number of workmen, loafing of workmen, diversion of work to merchant ships, difficulty in securing skilled mechanics, severe weather, lack of supervision. The construction of the vessel was greatly delayed by numerous changes in drawings, plans, and specifications, the extent of the delay thereby occasioned not being reported by the superintending constructor, nor is it shown what proportion

of the entire period of delay was assignable to each of the causes above enumerated. It does not appear to what extent, if any, the said delays were due to circumstances beyond the control of the contractor.

The *Idaho* was constructed in full accord with the drawings, plans, and specifications as modified from time to time. Delays experienced were made the basis of claims for extension of time. These claims were duly considered as provided in the contract and the delivery date was, by the defendant, extended to March 24, 1919, on which date the boat was conditionally accepted by the defendant in accordance with the contract.

The superintending constructor's letter of May 10, 1919, transmitting the information as to the extension of time, set forth the following statement of the Navy Department:

"It appears from the bureau's joint letter herewith that the contractors for the construction of the *Idaho* have from time to time submitted claims for extension of the contract time for the completion of the *Idaho*, action on which was deferred until the vessel was delivered, when comprehensive action could be taken by the department. In view of the several delays which, according to the statement made by the bureaus, were beyond the control of the contractors, which necessarily delayed the vessel, the department approves the recommendations made by the bureaus that the contract time for the date of completion of the *Idaho* be extended to the date of delivery, March 24, 1919."

Payment of the contract price less a reserve of $100,000.00, together with a payment of $650,520.76 for additional costs due to changes in the drawings, plans, and specifications, had been made by the defendant from time to time in accordance with the terms of the contract.

Thereafter, on August 9, 1921, the Acting Secretary of the Navy, by letter to the Corporation, advised that final acceptance had been made and that after deducting the cost of certain defects from the reserve fund the defendant owed in final settlement $52,909.93. A release made out in the name of the plaintiff was enclosed for signature. No release was ever executed either by plaintiff or the Corporation, nor has the amount of $52,909.93 ever been paid by the defendant, although plaintiff has demanded payment.

V. On March 21, 1917, the following telegram from the Secretary of the Navy was received by the Corporation:

"Under authority contained last naval bill, President will suspend eight-hour law as applying to naval contracts in such cases as will result in expedition of work. Wire statement of contracts that you can expedite and to what extent by reason of such suspension. Department suggests question of change of cost be settled as a change under the contract.

"JOSEPHUS DANIELS."

In answer thereto the following telegram was sent:

CAMDEN, N. J., *March 22, 1917.*

SECRETARY OF THE NAVY,
Washington, D. C.

Answering your telegram of yesterday, all Government contracts at this yard can be expedited by the suspension of the eight-hour law. The extent of this can not be determined until the work is undertaken. We do not think that the cost of overtime and speeding up can be treated as a change under the contract.

NEW YORK SHIPBUILDING CORPORATION.

Under date of March 27th the superintending constructor, by letter to the Corporation, officially advised that the President, on March 22, 1917, had suspended the provisions of the eight-hour law on Navy contracts. Like information was under the same date given by the inspector of machinery representing the Bureau of Engineering of the Navy Department, and on March 28th the inspector, referring to the notice above, wrote the Corporation as follows:

"Subject: Eight-hour law—waiver of.
"References:
"(a) This office's #582-0-990, 3/27/17.
"(b) Enclosure with (a).

"1. Referring to (a) and (b), regarding waiving the requirements of the eight-hour law, this office is in receipt of a letter from the Bureau of Steam Engineering requesting to be informed as to what work building at these yards will be benefited by waiving the requirements of the eight-hour law, and to what extent.

"2. Please consider this matter *urgent*."

To this, answer was made to the inspector March 29th, as follows:

"1. Referring to your letters of March 27th and 28th, we have to say that we received some days ago, a telegram from the department to the same effect as the first-mentioned letter, and the department was informed that all work would be expedited by waiving the eight-hour law, but to what extent we could make no positive statement before starting the work.

"2. The matter of compensation still remains to be adjusted.

"3. We are awaiting further advices from the department."

On March 31st following, two identical letters were written by the Corporation to the superintending constructor and the inspector as follows:

"1. On account of the necessity of expediting work on the *Idaho* as much as possible, and in the absence of any definite arrangement with the department for compensation, which it is understood they propose to make, we expect to start overtime work on Monday, April 2nd, and will render you a daily account of the number of hours over eight hours per man per day, for which, under the last naval act, pay is to be given at the rate of time and a half. This method will be followed pending arrangements with the department."

VI. On April 2, 1917, the Corporation commenced the employment of workmen in excess of eight hours per day.

On the same date, April 2, 1917, the superintending constructor forwarded the Corporation's letter of March 31, 1917, to the Bureau of Construction and Repair with the following endorsement:

"Subject: *Idaho* (42)—Overtime to expedite completion.

"References:

(a) N. Y. S. let. Feb. 28/17, forwarded with S. C. end. Mar. 19/17, No. 29536—M 101, relative to extension of contract time, U. S. S. *Idaho*.

(b) Navy Dept. circular letter March 23/17, No. 10107—289 (Op—23), quoting for information, Executive order relative to overtime on naval work.

(c) Sup. Con. Camden telegram to Bureau C. and R. April 2/17, No. 29764—M 101.

"1. Attention is invited to the notification in contractor's letter herewith, dated March 31/17, received in this office April 2/17. Attention is further invited to the inquiries in my telegram, reference (c) 'extended contract period,' mentioned in the telegram, referred to the extension of the

contract time requested and recommended in correspondence, reference (a).

"2. If additional compensation is to be allowed the New York Shipbuilding Company in connection with work on the *Idaho* under the inspection of this office, it is necessary that instructions be issued relative to basis of compensation, relative to verifying that any additional compensation has been earned, and relative to the method of certification and preparation of public bills covering such extra compensation."

A copy of this endorsement was sent to the Corporation.

The superintending constructor also on the same date wired the Bureau of Construction and Repair as follows and delivered a copy thereof to the Corporation:

"Contractors have informed this office that they will start working overtime on the *Idaho* April second and will render a daily account of number of hours over eight hours per man per day for which, under naval act, pay is to be given at the rate of time and a half pending arrangements with department. I request instructions relative to accepting such reports and if accepting same obligates the Government and inquires what access to the contractors' record should be afforded this office in order to verify reports. I also inquire if overtime that may be necessary to complete the vessel within the extended contract period is to be classed as overtime expediting the work. 12302"

Likewise under dates of April 2 and 4, 1917, the Corporation received letters from the inspector of machinery, respectively, as follows:

[April 2, 1917.]

"Subject: Eight-hour law—waiver of.

"References:

(a) Your letter 3/29/17.
(b) Your letter 3/31/17.
(c) This office's #582–0–990, 3/27/17.
(d) Enclosure with (c).
(e) This office's #593–0–990, 3/28/17.

"1. Referring to (a) and (b), replying to this office's (c) and (e), and enclosure (d), regarding the waiving of the requirements of the eight-hour law in connection with work building at these yards, the following letter received from the Bureau of Steam Engineering this date is quoted for your information and action:

"* * * the inspector of machinery is not authorized to allow or obligate the department to allow the contractors any additional compensation for overtime work.

"It is understood that the Secretary of the Navy has taken this matter up orally with a representative of the contractors and informed him that absolutely no additional compensation will be allowed unless the vessel be delivered before her contract time of completion.

"2. Your letter, reference (b), will be forwarded to the Bureau of Steam Engineering this date."

[April 4, 1917.]

"Subject: Eight-hour law—waiver of.

"References:

(a) Your letter 3/31/17.
(b) This office's #615–0–990, 4/2/17.
(c) References in (b).

"1. Referring to (a) and (b), regarding waiving of the eight-hour-law requirements in connection with work building at these yards and to the statement in your letter, reference (a), that beginning Monday, April 2nd, you will start overtime work, pay to be given at the rate of time and one-half, you are informed that this matter was referred to the bureau, and this office is in receipt of the following telegram (received at 2.30 p. m. this date):

"'Inform contractors department will not allow additional compensation for overtime work *Idaho*. If contractors expect to claim delay, submit claim for prompt settlement.'"

To these answer was made to the inspector as follows:

"Replying to your letter of April 2nd, quoting bureau's letter, we have to say that we are not at all clear concerning the bureau's letter.

"We attach copies of two telegrams, which are the extent of our dealings with the department, and would say that we have no knowledge of any verbal communication from the department to a representative of this company concerning the conditions under which additional compensation would be allowed.

"We have to say, furthermore, that, under the contract, an extension of time is due the contractors and claim has been made for the same, but at this time it is not possible to state whether the vessel will or will not be completed before the expiration of this time, and we have no alternative other than to keep and submit a record of the overtime which is worked in the endeavor to expedite the completion of the vessel."

VII. On April 7, 1917, the Corporation received the following telegram from the Secretary of the Navy:

WASHINGTON, D. C., *7 Apr., 17.*

NEW YORK S. CORP.:

Mississippi was launched in January last. *New Mexico* slated to be launched April twenty-third. No information as to when you contemplate launching *Idaho*. Department expects you to expedite work on this vessel by all means possible.

JOSEPHUS DANIELS.

VIII. Answering the Corporation's letter of March 31, 1917, set out in Finding V, *supra*, the superintending constructor, by letter dated April 16, 1917, stated that none of the daily accounts mentioned had been received, requested that they be submitted, and concluded with the statement that he would confer with the Corporation as to their form and verification. For the Corporation's "information and guidance" he furnished with said letter a copy of the following communication addressed to him April 13, 1917, by the Bureau of Construction and Repair:

"1. The department has approved the recommendation of this bureau that the superintending constructor be authorized to accept, pending final arrangements, the contractors' reports on overtime work and that he be authorized to require such access to the contractors' records as will enable him to verify their reports. Similar authority has been granted by the department to the inspector of machinery at the contractors' works."

On April 17, 1917, the inspector wrote the Corporation as follows:

"Subject: Eight-hour law—waiver of.
"Reference: (a) Your letter 4/4/17.
(b) References in (a).
(c) Enclosures with (a).

"1. Referring to (a) and (c), regarding suspension of the eight-hour law in connection with Government work building at these yards, you are informed that this matter was referred to the bureau, and in letter received this date the bureau states as follows:

"'While the Secretary of the Navy in person informed the Engineer in Chief that no extra compensation would be allowed the contractors for overtime work on the *Idaho*, no

formal written decision has been issued by the department regarding the suspension of the 8-hour law and extra compensation to the contractors for work in excess of 8 hours.

"'Therefore you are not authorized to allow, or obligate the Government to allow, the contractors any extra compensation for overtime work; but in view of the contractors' statement as given in enclosure with reference (a), and in order that accurate information may be available, you are authorized to accept, pending final arrangements, the contractors' reports on overtime work, and to require now such access to the contractors' records as will enable you to verify their reports.'

"2. If you have any comments to make regarding the above, it is requested that they be furnished at the earliest possible date in order that the bureau may be advised."

Following the receipt of the above letter of April 16th, daily reports of overtime work were rendered to the superintending constructor and the inspector. Frequently thereafter the alleged lack of promptness in furnishing these reports was made the subject of correspondence by the superintending constructor.

These reports continued to be rendered until January 8, 1918, when, on suggestion of the superintending constructor, and with the express understanding that his office should have free access to the original time records whenever it is so desired, reports to him on overtime work were discontinued, but the Corporation continued to keep its records thereof as before and access thereto was given the superintending constructor.

IX. Under date of April 17, 1917, the plaintiff received from the superintending constructor, with request by him for "an early statement relative to the possibility of increasing the rate of progress on the *Idaho*," a copy of the following letter addressed to him April 16, 1917, by the Bureau of Construction and Repair:

"Subject: *Idaho*—Progress report for month of March, 1917.

"Reference: (a) Suptg. constr.'s report for month of March, 1917.

"1. It is noted from paragraph 2 of reference (a) that the progress on the *Idaho* during the month of March was such as to increase the delay by five-tenths of a month, which

delay you attribute to an insufficient number of men working on the vessel to accomplish a month's progress; also that testing work prior to launching must be expedited if the vessel is to be launched early in June.

"2. In view of the existing emergency the progress on the *Idaho* should be expedited by every possible means and it is desired that the contractors be requested to submit a statement as soon as possible as to the possibility of increasing the working force on the *Idaho* so as to accomplish this purpose."

In answer thereto the plaintiff on April 25, 1917, replied that it was using every effort to launch the vessel at an early date, that the number of men employed could not be greatly increased before the launch, with the exception of those engaged in testing compartments and preparing the launch, that it would increase the number employed as much as practicable, and that all practicable overtime work was being done. In forwarding this letter to the Bureau of Construction and Repair the superintending constructor concurred generally in the plaintiff's statements.

X. On May 16th, 1917, the Navy Department announced to its bureaus its position relative to the question of expediting work on naval vessels as follows:

"Executive Order No. 2554 of March 22nd, 1917, which was promulgated by the department's circular letter of the 23rd of March, is not regarded as effecting a suspension of the eight-hour law in any particular case until it has been authoritatively decided that the suspension in such case would accomplish the object stated in the order, namely, 'hastening preparation to meet present emergency conditions,' and declared that the order is applicable to such case.

"The department has, in cases brought to its attention, directed that said Executive order be taken as applicable to the work under certain specified contracts, relying on reports by the bureaus as to the advisability of suspending the eight-hour law in such cases. Information obtainable from contractors and an expression of their judgment are very important to a settlement of the question of suspending the law in all cases, but decision as to the suspension of the law can not be left to them. This method of dealing with said question is regarded as essential to a proper establishment of the status of each particular case and will be followed, but it is not deemed essential that a recommendation or expression of judgment by the bureaus in such a case should go into

details to an extreme extent and it is desired that the question of suspending said law in all cases be determined without unnecessarily adding to either the time or the correspondence or the handling of papers requisite to an intelligent consideration of the matter.

"In cases such, for instance, as that of the Newport News Shipbuilding & Dry Dock Company mentioned in the accompanying papers, where the contractors have been given to understand that employment of men for more than eight hours a day in accordance with the terms of said Executive order was left to their discretion, their action in the premises up to this time will be approved unless cogent reason should appear for contrary action.

"In accordance with the foregoing the cost of overtime work on all vessels building under contract will be adjusted by the boards on changes in all cases where no bonus is provided for in the contracts, the board to be guided by the following instructions, viz:

"First. The amounts to be allowed shall be based on the extra cost of overtime pay with such general allowance for overhead costs and on account of displacement of merchant work, if any, as are reasonable and proper according to the circumstances of the work, not including, however, anything for damages on account of delay to the parties for whom such merchant work is being done.

"Second. Each such change on each vessel shall cover the extra cost for three months' time and be acted on by the boards as soon as practicable so as not to delay the payment of large sums and force the contractors to carry the burden thereof for an unreasonable time.

"The bureaus will take appropriate action in the premises."

XI. On April 29, 1918, the Corporation received the following:

"1. Attention of the New York Shipbuilding Corporation is invited to the Navy Department's letter #28905-011; 42-6, dated April 18th, quoted in Bureau C. & R. letter #18084-A 1, dated April 20th, made the subject of reference (d), which states that 'in all cases, however, decision as to whether a contractor shall be allowed to employ his workmen under Navy contracts more than eight hours a day shall, as heretofore, rest with the Secretary of the Navy.'

"2. It appears that specific authority has already been given for overtime work on the *Idaho* and on all destroyers building at these works, but that such overtime is limited to sixty hours per week.

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"3. It is expected, therefore, that overtime work on the vessels thus far authorized will be limited to sixty hours per week. Should overtime authority be found necessary on other vessels building at these works, a specific request will be preferred by you setting forth in full the conditions making such request necessary, and stating probable duration, number of men involved, general character of work, and schedule of proposed working hours.

"4. If for any reasons such as set forth in your letter, reference (c) to the shipbuilding labor adjustment board, you deem it absolutely necessary to work in special cases longer than sixty hours per week, these instances are to be made the subject of specific requests to the cost inspection board.

"(Signed) GUSTAV KAEMMERLING,
"*Inspector of Machinery, U. S. N.*
"ELLIOT SNOW,
"*Superintending Constructor, U. S. N.*
"DAYTON P. CLARK,
"*Cost Inspector, U. S. N., Acting.*"

In May, 1918, at a conference with the plaintiff's and Corporation's president, the Secretary of the Navy urged expedition and stated that the increased cost including overtime would be taken up after completion of the vessel. Overtime work was thereupon increased to the maximum, to wit, 60 hours per week.

XII. All overtime wages were paid at the rate of time and one-half of the basic eight-hour day rate. Assuming that all other things would have been equal, the use of overtime work on the *Idaho* reduced the time for its construction over what it would have been had the eight-hour limitation been maintained.

Overtime work in the construction of the said vessel was used with full knowledge of the defendant, and continued until after November 16, 1918, when instructions were given by the defendant to discontinue its use. Overtime work was continued, however, but claim for remuneration therefor after that date is not a part of this suit.

XIII. After the declaration of war an increasing expansion of all lines of industry, and particularly that of shipbuilding, took place. This resulted in abnormal demands for workmen and consequent scarcity, particularly among the

skilled trades. In an attempt to stabilize so far as possible labor conditions during the period of the emergency, an agreement dated August 20, 1917, and amended December 8, 1917, was entered into between the Secretary of the Navy, chairman of the United States Shipping Board, general manager of the Emergency Fleet Corporation, and officers and representatives of several of the unions whose trades were involved, by which agreement there was created a board known as the shipbuilding labor adjustment board. This board was established for the purpose of adjusting disputes which might arise concerning wages, hours, and working conditions of labor engaged in the construction or repair of shipbuilding plants or of hulls or vessels in the shipyard under contract with the Emergency Fleet Corporation or the United States Navy Department. The plaintiff was not a party to this agreement. The said board proceeded to function, and on February 14, 1918, rendered a decision fixing a minimum rate of wage and fixing hours and conditions of labor for workmen in the Delaware River district, which included the shipyard of the New York Shipbuilding Corporation. These rates were to be retroactive to November 2, 1917. At the time of the promulgation of such decision there was no strike or dispute regarding wage hours or conditions of labor in the Corporation's shipyard and no dispute as to the same had been submitted to said board for adjustment. Up to that time the hours and conditions of labor so far as the plaintiff or Corporation was concerned had been determined by an agreement with the individual workman at the time of his contract of employment.

XIV. On February 19, 1918, the Corporation received a telegram from a representative of the Emergency Fleet Corporation announcing the decision of the shipbuilding labor adjustment board and further saying, "Authority is hereby granted to make these rates effective on the date named," viz, February 25, 1918.

Thereupon on the same date the president of the Corporation wired the Secretary of the Navy as follows:

"Do you authorize us to pay our men on Navy work according to findings of shipbuilding wages adjustment

board. We have been ordered by Emergency Fleet Corporation to make increases awarded and can not discriminate."

At the time the above telegrams were transmitted the Corporation's entire yard was devoted to work for the Government, the same being apportioned between the Navy and the Emergency Fleet Corporation. It was not practicable for the Corporation to maintain two different wage scales for a like character of work.

On February 20, 1918, the plaintiff and seven other shipbuilding companies of the Delaware River district wired the Secretary of the Navy as follows:

"The following-named shipbuilders accept the decision of shipbuilding labor adjustment board as to wages, hours, and other conditions, dated February fourteenth, with the understanding that the Government and Emergency Fleet Corporation will reimburse them for the expense incurred thereby. In order to put the decision into effect at the earliest possible date we consider it absolutely necessary and essential that the board send to the Delaware River district and Baltimore its examiner and Mr. Seager to adjust many intricate questions involved in the decision. An officer of the Harlan and Sparrows Point plants of the Bethlehem Shipbuilding Company will confer with you personally tomorrow in regard to the decision."

The reply of the Secretary of the Navy to the Corporation's telegram of February 19th was sent March 8th, and is as follows:

"Referring to your message of Feby. 19th, the department expects to reimburse contractors for unavoidable increases of cost due to adoption of wage adjustment board scale, these matters to be treated as changes under fixed-price contracts. Submit increases to department for approval."

XV. Upon receipt of the reply of the Secretary of the Navy dated March 8, 1918, *supra*, the Corporation discontinued bargaining with its workmen and put into effect and paid the shipbuilding labor adjustment board awards, both immediate and retroactive, on all Navy work, including the *Idaho*. At that time the only fixed-price naval contract remaining in the yard of the Corporation was the contract for the construction of the *Idaho*. From and after the said awards were put into effect work on the *Idaho* was continued

and without interruption by strike or other labor disturbance.

The original price of the contract for the construction of the *Idaho* was estimated by the plaintiff upon the rate of wages in effect at the time of its execution, such rate having been constant for a period of five years next prior thereto, and said estimate included no provision for overtime work.

XVI. On June 19th, 1918, the plaintiff wrote joint letters to the inspector of machinery and superintending constructor as follows:

"Referring to the telegram from the Department quoted below:

"'WASHINGTON, D. C.

"'M. A. NEELAND,
"'*N. Y. Shipbuilding Corp.*,
"'*Camden, N. J.*

"'Referring to your message of February 19th, the department expects to reimburse contractors for unavoidable increases of cost due to adoption of wage adjustment board scale. These matters to be treated as changes under fixed price contracts. Submit increases to department for approval.

"'SEC. NAVY.'

"2. Pursuant to the above, we have to advise the department that we have now completed the payment to the men so far as back pay upon our contract 160, the battleship *Idaho*, is concerned, and we hereby submit an estimate of increased cost of one hundred twenty-four thousand five hundred ninety-six dollars and fifty-three cents ($124,596.53), covering this amount. Our books, which show the method used in arriving at this amount, will be open to the inspection of the board in their consideration of this case.

"3. It should be noted that the above sum does not include the back pay given men who are working on changes on the *Idaho* under special yard numbers. We understand that these amounts will be settled by the board on changes when the individual changes are considered.

"4. In view of the considerable amount of money involved, we request that this matter be referred to the board on changes with a view of covering the back pay only. It is our intention to submit further claims for increased wages on the *Idaho* (not back pay) either monthly or every two months, depending upon the amount of money involved, and

will request that these be adjudicated by the board on changes so that payments may be put through promptly.

"5. On account of the impossibility of correctly separating the labor chargeable to the Bureau of Steam Engineering from that of the Bureau of Construction and Repair, in the above back-pay estimate, we suggest adjudication of change by a joint board."

This estimate was returned to the plaintiff by the defendant through the superintending constructor and the inspector of machinery with a request for more detailed information and with the statement that when returned the bureaus would take further action.

XVII. The shipbuilding labor adjustment board having on October 14, 1918, made further increases in its wage scales and the Corporation having adopted and paid the same, another joint letter was, on November 19, 1918, sent by the plaintiff to the defendant's inspector of machinery and superintending constructor, as follows:

"Subject: *Idaho* change, Wage Adjustment Board, scale of wages.

"Reference:

(a) Contr.'s letter June 19/18.

(b) Sup. Con. 1st end. #41268–M–125, of June 21/18.

(c) Joint 2nd end. of Bureau C. & R. & S. E. Nos., respectively, 18084–A 1 and 319457–630.

(d) Sup. Con. letter #41373–M–125, of June 25, 1918.

"Enclosure: (A) Schedules of increased direct labor costs with summary in duplicate.

"Sir: In accordance with telegram from the Secretary of the Navy of Feb. 20, 1918, copy of which was inserted in our letter reference (a), we beg to submit herewith as a change under the contract our estimate for an increase in cost of $573,679.20 for increased wages on the *Idaho* (not including back pay), and are enclosing schedules of increased direct labor costs in duplicate, covering the period from November, 1917, to August, 1918, inclusive, together with summary of same to which has been added our estimate of $124,596.53, see reference (a), making our total estimate to September 1st, 1918, under the subject matter $698,295.73.

"2. It will be recalled that in the telegram of the Secretary the department directs us to comply with the Macy Board's award, and assumed the increased cost on fixed price contracts. It was directed that the matter be treated as a change under the contract. Our present letter subdivides

our 'estimate' for (a) back pay under the award and (b) increased wages to Sept. 1st, 1918, and we request that same may be brought to the attention of the board with a view to our early reimbursement.

* * * * *

"8. On account of the impossibility of correctly separating the labor chargeable to the Bureau of Steam Engineering from that of the Bureau of Construction and Repair, in the above estimate, we suggest adjudication of change by a joint board."

On November 22nd, 1918, the superintending constructor, referring to the above letters of June 19, 1918, and November 19, 1918, requested certain additional detail statements relative to increased rates for the purpose of aiding in the consideration of a change then under examination.

XVIII. A final estimate of the increased cost of the *Idaho* due to such increased wages was likewise submitted to the defendant by the plaintiff on April 22, 1919, reading as follows:

"The battleship *Idaho* having been delivered to the Government, we think it best to supersede reference (e) with the total increase in cost on account of increased labor rates from November 2, 1917, to March 31, 1919, and submit herewith an increased cost of one million three hundred ten thousand nine hundred twenty-six (1,310,926) dollars, this amount being exclusive of retroactive wages.

"We enclose herewith schedules of increased direct labor for the months of September, 1918, to March, 1919, inclusive. The schedules for the previous months having been submitted with our letter, reference (e).

"Regarding the change in cost caused by the retroactive wages, we beg to submit herewith an increase in cost of two hundred seventeen thousand three hundred and one (217,301) dollars. This amount covers the first award paid by us June, 1918, and the second award paid by us February 1st, 1919.

"We also submit an increase in cost of four thousand two hundred and sixteen (4,216) dollars, caused by the 5% bonus for night shifts as authorized by the ship labor adjustment board.

"In addition to the above increases there is an increased cost paid on our account of Charles Cory & Son and Wm. Cramp & Sons Shipbuilding and Engine Co., amounting to four thousand two hundred ninety-three (4,293) dollars.

"We submit the above figures for verification by the cost inspector.

"Assuming that the above changes will be acted on by a joint board, we have submitted a similar letter to the superintending constructor."

XIX. Neither the claims for reimbursement for increased wages paid (other than to workmen engaged on changes in the drawings, plans, and specifications), nor the claims for amounts paid for overtime in excess of regular time rates were ever submitted to or acted on by any of the boards on changes.

XX. Payments made to workmen for direct labor for overtime on the *Idaho* in excess of regular time rates, such excess being known and hereinafter referred to as "plus time," from April 2, 1917, to November 16, 1918, exclusive of plus-time increases, amounting to $32,866.11, paid to workmen in accordance with the awards of the shipbuilding labor adjustment board over and above the wages in effect February 24, 1918, amounted to $169,058.03, the total aggregating $201,924.14. The said sum of $201,924.14 does not include plus time on changes in drawings, plans, or specifications.

Plaintiff has demanded of the defendant payment of the said sum of $201,924.14, but no part thereof has been paid by the defendant.

XXI. The amount of increases in wages paid for direct labor on the *Idaho* by reason of the awards of the shipbuilding labor adjustment board, over and above the rates of wages in effect February 24, 1918 (other than such increases as were contained in payments for overtime work in excess of regular time rates, that is to say, plus time), was $468,613.70. This sum includes certain increases paid for work on changes in drawings, plans, and specifications, the amount whereof does not appear, but which were included in claim of $147,108.00 presented to the boards on changes as hereinafter shown.

XXII. There were also paid to workmen engaged in the construction of the *Idaho* in accordance with the awards of the shipbuilding labor adjustment board further increases in

wages over and above wages theretofore paid them, said retroactive increases amounting in the aggregate to $146,-986.20. This sum includes certain increases paid for work on changes in drawings, plans, and specifications, the amount whereof does not appear, but which were included in claim of $147,108.00 presented to the boards on changes as hereinafter shown. It does not include retroactive wages on overtime work in excess of regular time rates.

XXIII. The overhead expense of plaintiff's plant or yard was apportioned to the several ships building therein by the use of the amounts paid for labor directly engaged thereon as the determining factors. In cost-plus-profit contracts such overhead constituted a part of the cost of each ship. At the time the *Idaho* was being constructed there were building in plaintiff's plant other ships, and during all or a major part of such time plaintiff's entire plant, with the exception of the *Idaho*, was devoted to work for the Government on a cost-plus-profit basis.

The overhead expense claimed in this suit in connection with wages paid is not satisfactorily proved.

XXIV. The estimates of cost of changes only in drawings, plans, and specifications of the *Idaho* submitted by the plaintiff from time to time to the boards on changes and the cost of such changes only in drawings, plans, and specifications as found by said boards on changes had been based on the rates of wages in effect prior to the first decision of the shipbuilding labor adjustment board and did not include or allow for the increases in wages paid in accordance with the decisions of said shipbuilding labor adjustment board, all of which increases had been kept as a separate change. On July 17, 1919, the plaintiff requested that as there was considerable doubt as to the defendant proceeding at that time to a settlement covering the increased wages the findings of said boards on changes, with respect to the cost of such changes in drawings, plans, and specifications, be reopened so as to allow to the plaintiff the actual cost of such changes and submitted an estimate of $147,108.00 as the cost, including overhead, of increases in wages paid in connection with such changes in drawings, plans, and specifications which

had not been included in the original findings of the boards on changes, the balance of the claim to await further disposition. Thereafter the defendant directed the boards on changes on the *Idaho* to reopen their findings on the cost of such changes only in drawings, plans, and specifications. The boards on changes did reopen such findings covering such changes only and allowed an additional amount of increased cost of such changes of $120,522.55, which has been paid. This amount is a part of the sum of $650,520.76 paid as found in Finding IV.

The plaintiff has demanded of the defendant payment of the cost of increases in wages paid to workmen engaged in the construction of the *Idaho* in accordance with the awards of the shipbuilding labor adjustment board, but no part thereof not considered by the boards on changes has been paid.

XXV. On March 4, 1925, an act was passed by Congress and approved by the President entitled "An act for the relief of the New York Shipbuilding Corporation for losses incurred by reason of Government orders in the construction of battleship No. 42." Neither the plaintiff nor the New York Shipbuilding Corporation has filed any claims with the Navy Department under said act of Congress of March 4, 1925.

XXVI. The following is a recapitulation of the amounts due:

Finding:		
IV. Reserved		$52, 909. 93
XX. Plus time		201, 924. 14
XXI. Direct labor increases not retroactive	$468, 613. 70	
XXII. Same, retroactive	146, 986. 20	
Total	615, 599. 90	
Less claim presented to boards on changes (Finding XXIV)	147, 108. 00	
Net		468, 491. 90
Total		723, 325. 97

The court decided that plaintiff was entitled to recover, in part.

Moss, *Judge*, delivered the opinion of the court:

On November 9, 1914, plaintiff entered into a contract with the United States Government for the construction of the battleship *Idaho* for the sum of $7,250,000. The ship was to be completed and delivered on or before November 9, 1917, or thirty-six months after the date of the contract. It was actually completed and delivered on March 24, 1919. Delays, experienced from time to time, were made the basis of applications for extension of time, and upon due consideration these applications were granted by the Government and the delivery date made to extend to the date of the completion and delivery of the ship. Payment of the full amount of the contract price, less a reserve of $100,000, together with a payment of $650,520.76 for additional cost on account of changes in the drawings, plans, and specifications had been made from time to time in accordance with the terms of the contract. Thereafter plaintiff was notified that after deducting the cost of certain defects from the reserve fund of $100,000 there was due plaintiff the sum of $52,909.93. Plaintiff refused to accept same in full settlement, and this amount is admittedly due.

Plaintiff is suing to recover on three items: (1) Overtime wages paid by plaintiff; (2) increase in wages by direction of the Secretary of the Navy under a decision of the shipbuilding labor adjustment board; and (3) overhead claimed by reason of increase of proportion of overhead applying to the *Idaho*.

These will be considered in the order stated. On March 24, 1917, a telegram was sent to plaintiff by the Secretary of the Navy, which reads as follows:

> "Under authority contained last naval bill, President will suspend eight-hour law as applying to naval contracts in such cases as will result in expedition of work. Wire statement of contracts that you can expedite and to what extent by reason of such suspension. Department suggests question of change of cost be settled as a change under the contract."

Plaintiff replied, "Answering your telegram of yesterday, all Government contracts at this yard can be expedited by the suspension of the eight-hour law. The extent of this

can not be determined until the work is undertaken. We do not think that the cost of overtime and speeding up can be treated as a change under the contract."

No agreement being reached as to the method of adjustment of the cost of overtime, plaintiff notified the superintending constructor and inspector of machinery in writing on March 31, 1917, that overtime work would begin on April 2, 1917, and that a daily account would be rendered showing the number of hours per day for each man employed over eight hours, and stated, "This method will be followed pending arrangements with the department." In accordance with this proposal, plaintiff continued thereafter to employ overtime and to furnish reports on overtime work until January 18, 1918, when same was discontinued at the suggestion of the superintending constructor. It is the contention of defendant that the overtime work on the *Idaho* was performed voluntarily by plaintiff, and with full knowledge that no extra compensation would be authorized or paid unless the completion of the vessel was expedited; and that instead of advancing the work on the *Idaho*, same was neglected and preference was given to other contracts. The record does not sustain this contention in any particular. The voluntary overtime work performed by plaintiff was in connection with the *Colorado* and the *Washington*, as appears from a report from the superintending constructor, in which it is stated, "there is a small amount of overtime work in progress for the *Colorado* and the *Washington* * * *. No returns of this work are received, and I understand that no claim will be made for extra compensation." The clear inference is, and the record shows, that returns were being received as to the cost of overtime on the *Idaho*. During the period from March 21, 1917, when overtime was authorized, until after the armistice, in November, 1918, the Government was engaged in the most gigantic navy program the world has ever seen. The supreme demand was for ships. Plaintiff, as well as all other ship contractors, was being urged to advance the work under contract, and especially as to the *Idaho*, which was nearing completion. On April 13, 1917, Admiral Taylor, Chief of the Bureau of Construction and Repair,

wrote to the superintending constructor at plaintiff's plant as follows:

"The department has approved the recommendation of this bureau that the superintending constructor be authorized to accept, *pending final arrangements*, the contractors' reports on overtime work and that he be authorized to require such access to the contractors' records as will enable him to verify their reports. Similar authority has been granted by the department to the inspector of machinery at the contractors' works." (Italics ours.)

On May 16, 1917, the Government, by memorandum of the Acting Secretary of the Navy, adopted a fixed general policy in regard to overtime on Navy work in approving overtime in all cases where contractors had "been given to understand that employment of men for more than eight hours a day * * * was left to their discretion, their action in the premises up to this time will be approved unless cogent reason should appear for contrary action," and providing further that the extra cost of such overtime should be fixed by the boards on changes. It will be remembered that, at the inception of the overtime program, plaintiff had declined to accept defendant's suggestion that the cost of overtime be settled as a change under the contract, and in accordance with its own proposal had continuously thereafter furnished daily reports of such cost. This plan having been explicitly approved on April 13, 1917, by the Chief of Bureau of Construction and Repair was not altered in the least particular after the promulgation of the policy just mentioned, but was continued until the overtime work was suspended.

The record shows beyond question that the overtime work on the *Idaho* was performed with the understanding between the parties that plaintiff would be reimbursed therefor, the only question being the method of such reimbursement. The only conceivable basis for defendant's contention on this phase of the case is found in a letter dated April 2, 1917, from the inspector of machinery to the plaintiff, wherein it is stated:

"It is understood that the Secretary of the Navy has taken this matter up orally with a representative of the contractors and informed him that absolutely no additional compensa-

tion will be allowed unless the vessel is delivered before her contract time of completion," to which plaintiff immediately replied that it had no knowledge of any such verbal communication. This letter was the occasion for a time of considerable confusion, but the whole course of subsequent events conclusively demonstrates that the Government had no intention of establishing such a policy, and, in fact, it did not do so. The inspector of machinery was undoubtedly misinformed on the question which was made the subject matter of his letter.

In connection with defendant's contention that the work on the *Idaho* was delayed and neglected by plaintiff, and preference given to other work, argued in minute detail and at great length, the court can not refrain from expressing surprise that defendant's counsel has seemed to ignore the fact that by a definite ruling of the Navy Department after the delivery of the vessel it was formally determined that the several delays attending the construction of the *Idaho* were "*beyond the control of the contractors*" and approving the recommendation made by the bureaus that the contract time for the date of completion of the *Idaho* be "*extended to the date of delivery, March 24, 1919.*" The entire argument on the question of delays is therefore clearly irrelevant; and the charge that preference was given to other work is not sustained by the evidence. The Government is liable for the item of overtime. Payment of overtime was made at one and one-half times the regular wage, and in this case amounts to $201,924.14.

On February 14, 1918, the Shipbuilding Labor Adjustment Board, a duly established board with authority to adjust disputes which might arise concerning wages, hours, and working conditions of labor engaged in naval construction or repair, rendered a decision fixing a minimum rate of wage and fixing hours and conditions of labor for workmen in the Delaware River District, which included plaintiff's shipyard. These rates, authorized by the Secretary of the Navy, effected a substantial increase in plaintiff's wage expenditure, and were made retroactive to November 2, 1917. Answering plaintiff's specific inquiry on the question of reimbursement the Secretary of the Navy stated that "The

department expects to reimburse contractors for unavoidable increases of cost due to adoption of wage adjustment board scale. These matters to be treated as changes under fixed-price contracts. Submit increases to department for approval." That the Secretary of the Navy had authority to reimburse contractors for wage increases put into effect at his instance was definitely determined by the decision of the United States Supreme Court in the recent case of *E. W. Bliss Company* v. *United States*, decided December 12, 1927. Claims were submitted to the Navy Department, but no action on same was taken. The direct labor increases involved herein from and after February 14, 1918, amount to $468,613.70, and the retroactive increases amount to $146,-986.20. These amounts represent increases in wages put into effect by the Secretary of the Navy, and adopted and paid by the plaintiff. It appears, however, that plaintiff presented to the board on changes a claim in the sum of $147,108.00, and this sum included (1) nonretroactive increase in wages on changes, (2) retroactive increase in wages on changes, and (3) overhead. The record does not disclose the amount of each item. This claim was allowed in the sum of $120,522.55 which was paid and was disallowed as to the remainder. Inasmuch, however, as the claim was considered and acted on by the board whose action is final, the entire amount, $147,108.00, will be deducted from the aggregate of the two sums, $615,599.90. The remainder, $468,491.90, is the amount which plaintiff is entitled to recover on the item under discussion. Findings XXI and XXII.

The overhead expense claimed by plaintiff is not satisfactorily proved, and that item can not be allowed. Finding XXIII.

In the latter part of 1916 plaintiff effected a reorganization of its company whereby plaintiff sold and transferred to the New York Shipbuilding Corporation, incorporated on November 29, 1916, the assets and property of plaintiff, and as to its contract with the defendant for the construction of the *Idaho* an agreement was entered into on December 12, 1916, between plaintiff and the New York Shipbuilding Corporation by which plaintiff agreed to hold said contract and all benefits therein exclusively in trust for said corpora-

tion, and the corporation agreed to, and did thereafter carry on the construction of said vessel to its completion. Defendant was duly notified of this reorganization, and same was expressly approved, and the work was thereafter continued in accordance with said agreement, with no substantial change in the managing personnel. The contention by defendant that plaintiff is not entitled to recover by reason of the foregoing transaction is not tenable.

Plaintiff is entitled to recover the sum of $723,325.97, and it is so ordered and adjudged.

GRAHAM, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

F. W. MATTHIESSEN, JR., v. THE UNITED STATES

[No. F-333. Decided April 16, 1928]

On the Proofs

Income tax; agreed distribution of shares of stock to residuary legatee; profit from sale by legatee.—Before the will of a decedent was probated and the executors qualified, the executors and trustees, to whom all personal property was bequeathed in trust, agreed among themselves that the plaintiff, who was one of the residuary legatees as well as an executor and trustee, should receive certain shares of stock, which were immediately delivered to him. Thereafter the probate court ordered a distribution which was in accordance with the agreement and some time after that the said shares were transferred on the company's books and later, on the same day that the necessary certificates of stock were issued, sold by the plaintiff. *Held*, (1) that title to the said shares passed to the plaintiff at the date of the agreement, and (2) that the taxable income of the plaintiff from the sale was the difference between the market price at said date and the price realized at the sale.

The Reporter's statement of the case:

Mr. M. F. Gallagher for the plaintiff. *Messrs. E. B. Wilkinson* and *S. M. Rinaker* were on the briefs.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is and at all times herein mentioned has been a citizen of the United States and has at all times borne true allegiance to the Government of the United States and has never in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

The plaintiff is a resident of Triunfo, Ventura County, California, and so resided when the income taxes herein involved were paid, and is the sole and absolute owner of the claim herein involved, and has made no transfer or assignment of any part thereof.

II. The plaintiff is one of the residuary legatees named in the will of F. W. Matthiessen, sr., a citizen of the United States, who died February 11, 1918, a resident of the city of La Salle, La Salle County, Illinois, leaving a last will and testament and certain codicils thereto, copies of which are attached to the petition as Exhibit A and made a part hereof by reference.

Said will and codicils were admitted to probate in the probate court of La Salle County, Illinois, on March 21, 1918. Adele M. Blow and the plaintiff duly qualified as executors under said will and assumed the duties of such executors.

III. The residuary legatees, the executors, and the trustees named in said will entered into an agreement on March 13, 1918, which said agreement was in words and figures as follows, to wit:

We, Adele M. Blow and F. W. Matthiessen, jr., as executors of the last will and testament of Frederick W. Matthiessen, deceased, and Eda Matthiessen, Adele M. Blow, and F. W. Matthiessen, jr., as trustees under said will, hereinafter referred to as first parties, hereby assign, set over, and deliver to Eda Matthiessen the bonds and securities listed in Schedule A hereto attached; to Adele M. Blow, the bonds and securities listed in Schedule B hereto attached; to F. W. Matthiessen, jr., the bonds and securities listed in Schedule C hereto attached; to Merchants Loan & Trust Company, trustee for Philip Matthiessen Chancellor, the bonds and securities listed in Schedule D hereto attached, subject to adjustment as to interest accrued up to February 11, 1918.

We assign, set over, and deliver to Eda Matthiessen the stocks listed in Schedule E hereto attached; to Adele M.

Blow, the stocks listed in Schedule F hereto attached; to F. W. Matthiessen, jr., the stocks listed in Schedule G hereto attached; to the Merchants Loan & Trust Company, trustee for Philip Matthiessen Chancellor, the stocks listed in Schedule H hereto attached, reserving the right to impress the stocks of the Matthiessen and Hegeler Zinc Company, the La Salle and Bureau County R. R. Co., and the Western Clock Company with such trusts and conditions as we may hereafter designate.

We assign, set over, and deliver to George P. Blow, general agent for the said trustees, Eda Matthiessen and to Adele M. Blow, F. W. Matthiessen, jr., and the Merchants Loan & Trust Company, trustee for Philip Matthiessen Chancellor, the sums set opposite their respective names in Schedule I to be at once received by them.

We assign and set over to Eda Matthiessen, Adele M. Blow, F. W. Matthiessen, jr., and the Merchants Loan & Trust Co., trustee for Philip Matthiessen Chancellor, each one-fourth (1/4) of the balance of the cash in the estate of said Frederick W. Matthiessen, deceased.

Said balance of said cash is transferred, as are also the bonds and securities in Schedule J hereto attached, to be devoted, so far as necessary, by the recipients thereof in equal parts to the payment of income taxes to become due June 15, 1918, Federal and State inheritance taxes, and income taxes to become due June 15, 1919.

It is understood that the receipts given by the recipient of assets shall contain a refunding agreement, providing that they will refund pro rata to said executors sufficient to cover all estate liabilities.

The first parties agree to execute such further instruments and writings as may be necessary to carry out any formalities connected with the transfers hereinabove made.

(Signed) ADELE M. BLOW,
" F. W. MATTHIESSEN, JR.,
Executors of the Last Will and Testament of Frederick W. Matthiessen, Deceased.
(Signed) EDA MATTHIESSEN,
" ADELE M. BLOW,
" F. W. MATTHIESSEN,
Trustees under said will.

SCHEDULE A

List of securities * * *.

Received from Eda Matthiessen, Adele M. Blow, and F. W. Matthiessen, jr., as trustees, under the will of Fred-

erick W. Matthiessen, deceased, and Adele M. Blow and F. W. Matthiessen, jr., as executors of said estate, all the bonds set forth in pages one, two, three, and four of this Schedule A; each page being identified by my signature. I hereby agree to promptly meet any assessment called for by the executors of the estate for estate liabilities.

Dated this thirteenth day of March, 1918, A. D.

(Signed) EDA MATTHIESSEN.

SCHEDULE B

List of securities * * *.

Received from Eda Matthiessen, Adele M. Blow, and F. W. Matthiessen, jr., as trustees under the will of Frederick W. Matthiessen, deceased, and Adele M. Blow and F. W. Matthiessen, jr., as executors of said estate, all the bonds set forth in pages one, two, three, and four of this Schedule B; each page being identified by my signature. I hereby agree to promptly meet any assessment called for by the executors of the estate for estate liabilities.

Dated this thirteenth day of March, 1918, A. D.

(Signed) ADELE M. BLOW.

SCHEDULE C

List of securities * * *.

Received from Eda Matthiessen, Adele M. Blow, and F. W. Matthiessen, jr., as trustees under the will of Frederick W. Matthiessen, deceased, and Adele M. Blow and F. W. Matthiessen, jr., as executors of said estate, all the bonds set forth in pages one, two, three, and four of this Schedule C; each page being identified by my signature. I hereby agree to promptly meet any assessment called for by the executors of the estate for estate liabilities.

Dated this thirteenth day of March, 1918, A. D.

(Signed) F. W. MATTHIESSEN, JR.

SCHEDULE D

List of securities * * *.

Received from Eda Matthiessen, Adele M. Blow, and F. W. Matthiessen, jr., as trustees under the will of Frederick W. Matthiessen, deceased, and Adele M. Blow and F. W. Matthiessen, jr., as executors of said estate, all the bonds set forth in pages one, two, three, and four of this Schedule D; each page being identified by my signature.

I hereby agree to promptly meet any assessment called for by the executors of the estate for estate liabilities.

Dated this thirteenth day of March, 1918, A. D.

(Signed) THE MERCHANTS LOAN & TRUST COMPANY,
as Trustee for Philip M. Chancellor Under Will of Frederick W. Matthiessen, Deceased.
By LEON L. LOEHR, *Secretary.*

IV. On June 18, 1918, an order was entered in the Probate Court of La Salle County, Illinois, authorizing the executors to distribute to the residuary legatees all of the stocks of a value of $2,782,000 owned by the decedent except the stock of the Matthiessen & Hegeler Zinc Co.

V. On June 7, 1918, an order was entered in said probate court confirming and ratifying the distribution theretofore made to the residuary legatees of bonds in said estate of a value of $3,170,152.50.

VI. On June 28, 1918, an order was entered by said probate court approving the distribution of the bonds.

VII. Among the corporate stocks owned by the said decedent were 6,000 shares of preferred stock and 17,000 shares of the common stock of the Corn Products Refining Company, a corporation organized under the laws of New Jersey. On November 12, 1918, 1,500 shares of the preferred stock and 4,250 shares of the common stock were transferred on the books of the company from the name of F. W. Matthiessen, sr., to the name of F. W. Matthiessen, jr., the plaintiff, and certificates were issued to the latter. The certificates were received by the plaintiff on November 18, 1918, and on that date were sold by him on the New York Stock Exchange for the amount of $359,292.50, being $101⅜ per share for the preferred and $48.78⅛ per share for the common stock.

Prior to November 12, 1918, the said stock stood in the name of the decedent, F. W. Matthiessen, sr., upon the books of the Corn Products Refining Company, and the certificates of stock were in the joint possession, custody, and control of the executors of the estate, and the executors of the estate of F. W. Matthiessen, sr., deceased, collected and received all of the dividends therefrom paid prior to November 12, 1918.

VIII. Pursuant to the provisions of an act of Congress approved February 24, 1919, entitled "An act to provide

revenue, and for other purposes," the above-named plaintiff, on or about the 15th day of March, 1919, filed with the collector of internal revenue for the sixth district of California, his income-tax return for the calendar year 1918.

In said return the plaintiff did not include as income any gains on the sale of said Corn Products Refining Company stock referred to above.

Subsequent to the filing of said return the Commissioner of Internal Revenue, upon additional information and facts, submitted to him, directed a review and audit to be made of the income of said plaintiff for the calendar year 1918, and as a result thereof the income as theretofore reported by the plaintiff in said return was corrected and determined to be $161,488.65; and thereafter the Commissioner of Internal Revenue, on the 15th day of January, 1925, pursuant to the provisions of section 250 of the revenue act of 1918, determined a deficiency in income taxes for the calendar year 1918 in the amount of $39,616.82, as follows:

Block B		$12, 670. 55
" C		1, 725. 63
" D		89, 226. 55
" E		
" F		7, 373. 75
" G		1, 166. 70
" H		112, 163. 18
" I—Deductions		68, 289. 78
" J		43, 873. 40
" K (a) Div		117, 615. 25
Revised income		161, 488. 65
Pers. ex	$2, 000. 00	
Div	117, 615. 25	
		119, 615. 25
		41, 873. 40
		4, 000. 00
		37, 873. 40
Normal tax at 6% on $4,000.00		240. 00
" " " 12% " 37,873.40		4, 544. 81
Surtax		55, 943. 64
Total tax		60, 728. 45

Reporter's Statement of the Case

Tax paid at source		$144.48
Tax liability		60,583.97
Tax assessed	$14,231.55	
	6,735.60	
		20,967.15
Deficiency		39,616.82

The basis of the commissioner's determination of a deficiency in the amount of $39,616.82 was that the plaintiff had derived a profit from the sale of said Corn Products Refining Company stock by the difference between the value of said stock on February 11, 1918, the date of the death of the decedent, and the selling price on November 18, 1918.

IX. Pursuant to the provisions of section 279 (b) of the revenue act of 1924, the plaintiff duly appealed from the determination of said deficiency to the United States Board of Tax Appeals, which board, in a decision rendered on October 20, 1925, held that the plaintiff acquired said Corn Products Refining Company stock on March 13, 1918, the date of the agreement as stipulated in paragraph 3 hereof, and that he realized a profit based upon the difference between the market value of said Corn Products Refining Company stock on March 13, 1918, and the amount for which he sold said stock on November 18, 1918; that the said board determined the deficiency to be $23,316.32, as follows:

Net income, stipulated, exclusive of profit from sale of stock of Corn Products Refining Company, page 8, decision of Board of Tax Appeals			$72,725.90
Profit from sale of above stock, decision of Board of Tax Appeals: Selling price		$359,292.50	
Less:			
Market, 3/13/18, preferred	$144,937.50		
Market, 3/13/18, common	150,343.75		
		295,281.25	
			64,011.25
Corrected net income			136,737.15
Less:			
Dividends		117,615.25	
Personal exemption		2,000.00	
			119,615.25
Income subject to normal tax			17,121.90

Reporter's Statement of the Case

Normal tax at 6% on $4,000.00	$240.00
" " 12% on $13,121.90	1,574.63
Surtax on $136,737.15	42,613.32
Total	44,427.95
Less tax paid at the source	144.48
Tax liability	44,283.47
Previously assessed	20,967.15
Deficiency	23,316.32

X. Thereupon the Commissioner of Internal Revenue, on or about the 3rd day of March, 1926, duly assessed taxes in the amount of $23,316.62, which duly appear on the commissioner's special list No. 4, dated March 3, 1926, which said amount was paid to the collector of internal revenue at Los Angeles, in the State of California on March 23, 1926.

XI. The findings of fact, decisions, and opinion of said Board of Tax Appeals appear in its official reports and are cited as Appeal of F. W. Matthiessen, jr., 2 B. T. A. 921.

XII. The Commissioner of Internal Revenue assessed an additional income tax against the plaintiff for the year 1918 in the amount of $6,735.60, appearing on the March, 1924, assessment list, the amount of which assessment was taken into consideration by said Commissioner of Internal Revenue in his determination of a deficiency in tax for the year 1918 of $39,616.82, and was used by the Board of Tax Appeals in its determination of a deficiency of $23,316.32; and said assessment of $6,735.60, together with interest in the amount of $1,167.57, was duly paid by the plaintiff to the collector of internal revenue for the Sixth District of California on February 28, 1927.

XIII. Exclusive of any profit from the sale of any Corn Products Refining Company stock, the plaintiff had no net income for the year 1918 subject to normal tax, and had income of $72,725.90 subject to surtax.

XIV. The market value per share of Corn Products Refining Company stock at the various dates involved in this case was as follows:

	Feb. 11, 1918	Mar. 13, 1918	June 18, 1918	Nov. 12, 1918	Nov. 18, 1918
Common stock	$33.62½	35⅜ to 36¼	40¾ to 41⅜	46¾ to 48⅛	48⅞
Preferred stock	94.50	96⅝	99¾ to 101	101½	101¾

XV. The liabilities of the estate of F. W. Matthiessen, sr., deceased, for specific charitable legacies, expenses of funeral and of last illness, attorneys' fees, expenses of administration, debts, and Federal estate tax (as finally determined) amounted to $2,692,111.29.

XVI. On or about the 10th day of March, 1925, plaintiff filed with the collector of internal revenue for the first district of California a claim for refund in the amount of $4,266.36. On June 18, 1926, the Commissioner of Internal Revenue rejected said claim for refund in its entirety.

XVII. On or about the 25th day of March, 1926, the plaintiff filed with the collector of internal revenue for the first district of California a claim for refund in the amount of $23,316.32. On June 18, 1926, the Commissioner of Internal Revenue rejected said claim for refund in its entirety.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover an alleged overpayment of income taxes assessed and collected by the Commissioner of Internal Revenue upon profits claimed to have accrued to the plaintiff by reason of the sale of certain corporate stock bequeathed to him in the will of his deceased father. The facts in detail have been agreed upon and duly stipulated by the parties. The plaintiff's father, a resident of La Salle, La Salle County, Illinois, died February 11, 1918. By the provisions of his will, probated March 21, 1918, the plaintiff became entitled to a one-fourth share in the residuary estate. Among the assets of the same were 6,000 shares of preferred and 17,000 shares of common stock of the Corn Products Refining Company. The estate was a very large one and comprised numerous holdings of great value. The plaintiff and his two sisters received the entire estate in trust and were also appointed executors "with power over the personal property." By the terms of clause three of the will the plaintiff and his two sisters, the only surviving children of the testator, were directed at the end of one year after the probating of the will to divide the residuary estate into four parts, equal in value, and "by appropriate deed, deeds, as-

signments, or other means of conveyance convey one of such four equal parts " to the plaintiff, and a like share to each of his sisters; the Merchants' Loan & Trust Company of Chicago, Illinois, to receive in trust a one-fourth part, to hold and administer for the benefit of the testator's grandson during his minority.

On March 13, 1918, a little over a month after the death of the testator, and previous to the probating of the will, the plaintiff and his two sisters, acting as executors and trustees under said will, scheduled the assets of the estate into four equal parts, and by an instrument in writing, duly executed, set over, assigned, and delivered to each of the residuary legatees and devisees their one-fourth part of the residuary estate, each legatee receipting therefor and expressly agreeing "to promptly meet any assessment called for by the executors of the estate for estate liabilities." Under this agreement the stock involved in this suit was equally divided, 1,500 shares of the preferred and 4,250 of the common stock being receipted for by the plaintiff, as appears from Schedule C.

Subsequent to the execution of the above agreement, June 18, 1918, an order was entered by the probate court authorizing the executors to distribute to the residuary legatees all of the stocks of the testator, except certain ones with which we have no concern.

On November 12, 1918, the Corn Products Refining Company transferred on its books to plaintiff 1,500 shares of preferred and 4,250 shares of common stock, issuing to him certificates therefor on November 18, 1918. On the same day, viz, November 18, 1918, the plaintiff sold his entire holdings in the corporation. In making up his tax return for the year 1918 he did not include therein any gain or profit upon the sale of said stock. The commissioner reaudited the plaintiff's income-tax return, finally assessing an additional income tax of $39,616.82 against him, predicating his right to do so upon a contention that plaintiff acquired all of said stock upon the date of the death of the testator, and that the difference between the market value of the stock on that date and the date of sale measured the profits of the transaction. Plaintiff appealed to the Board of Tax

Opinion of the Court

Appeals, and that board, in a well-considered opinion, reduced plaintiff's income-tax liability to $23,316.32. This amount the plaintiff paid, filed a claim for refund, which was denied, and hence this suit to recover the tax paid, with interest thereon.

The plaintiff's argument is addressed exclusively to the date November 18, 1918. On this date it is insisted he became for the first time possessed of the absolute ownership and title to the stock, and having sold it immediately realized no profit from the sale. The defendant, on the other hand, sedulously contends that the date of the testator's death determines title. The Board of Tax Appeals, in disagreement with both contentions, fixed March 13, 1918, the date of the contract heretofore set out, as the determinative date.

The applicable sections of the revenue act are sections 202 and 213 of the act of 1918, 40 Stat. 1057.

Section 213 provides in part as follows:

"That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, * * *; but

"(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income) * * *."

Section 202 (a) provides in part as follows:

"That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

"(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

"(2) In the case of property acquired on or after that date, the cost thereof."

Opinion of the Court

Paragraph (3) of section 213 is emphasized by both parties, and the word "acquired." is singled out, and much effort is devoted to it to give it a restricted and technical meaning in support of the various contentions. A large number of cases are cited pro and con respecting the title of a deceased person's estate in the hands of his administrator or executor, and the time when a legatee becomes the owner of his legacy. In this case the court is in nowise concerned with the rights of creditors or the liabilities of executors to the same in the course of the administration and distribution of a testator's estate. We are alone confronted with a revenue act imposing a tax upon income derived from a bequest and ascertaining the intent of Congress in enacting the provision of law. Manifestly it requires no more than a mere statement that a residuary legatee under a will acquires an interest in a residuary estate on the date of the death of the testator. It is likewise obvious that he may sell and dispose of the same if he chooses. Whether the legacy is ever received in kind is, of course, dependent upon prior bequests and priority claims against the estate fixed by law. Seemingly it is elementary that until the legatee receives his legacy in possession, vested with absolute control and dominion over it, capable of asserting ownership against all the world, the contingent interest vesting at the date of the death of the testator is not merged in fee simple title. The taxing act under review recognizes this legal status. The income from a deceased person's estate is taxed in the hands of the administrator or executor, and a return must be made by these officials. If partial distribution of estate income has been properly made during the period of administration, it is to be charged to the beneficiary receiving the same and the executor credited with the amount distributed. Congress was fully aware of testate and intestate laws and the effect of death upon title to property descending by will. Surely it is a matter of no doubt that the executor's title to the personal estate of the testator is such that he may sell so much thereof as is necessary to discharge the legal obligations of the testator, and otherwise pass good title in executing the terms of the will as directed. He may institute actions at law to recover debts of the testator as

well as actions for the recovery of personal property. We find no decision of any court in the long list of cases cited which in any way modifies the long-established principle of law that the legal title to personal property vests in the personal representative of a deceased person, he being responsible under his bond for the faithful administration of the estate. It is difficult to conceive that Congress, in using the language "the value of property acquired by * * * bequest," intended to fix irrevocably a value at the date of the testator's death when by the very nature of the event it was incapable of ascertainment, speculative, and dependent finally upon a course of legal proceedings which must be first observed before it may be fixed. *United States* v. *Jones*, 236 U. S. 106, 112.

"It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. If the estate proves insolvent nothing is to pass to them. So in a practical sense their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly can not be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses. But that this right was not intended to be taxed before there was an ascertained surplus or residue to which it could attach is inferable from the taxing act as a whole and especially from the provision whereby the rate of tax was made to depend upon the value of legacy or distributive share."

The context of the statute indicates that Congress was dealing with a practical situation, employing language commonly used to reach estates in course of administration and at the same time providing for all the contingencies by which property in such a status might not escape taxation. The income of the estate is taxed in the hands of the executor

and added provisions reach it when the corpus reaches the legatee or devisee.

The plaintiff seeks to repudiate the agreement of March 13, 1918, now for the first time challenges its validity, and insists that notwithstanding the complete observance of its terms he did not acquire title and ownership of the stocks until they were transferred to his name on the books of the corporation. We doubt the availability of the contention. Is the plaintiff at present in a position to urge it, after it has been performed, and he has enjoyed all its benefits and advantages, wishing now to escape only its tax liabilities? To sustain the contention a section of the administration act of Illinois is cited. Under this enactment an executor of a deceased person's estate is precluded from exercising any powers, except those specifically mentioned in the statue prior to his qualification as such. With this as a premise the argument is made that to constitute an assignment there must be an assignor, and the law inhibits the executor from assigning until he qualifies, hence there was and can be no competent assignor prior to this time. The will was not probated until March 21, 1918, more than a month after the death of the testator. The plaintiff and his sister were co-executors and trustees of the entire estate; they, in conjunction with the testator's grandson, were the sole legatees and devisees of the entire residuary estate. If the agreement was a nullity, if its terms were disadvantageous, if it was not the intention of the sole parties in interest to acquire and possess the property distributed thereunder, if as a matter of fact they did not take the property scheduled, why was the agreement not repudiated in the court having jurisdiction of the administration of the estate? Some objection should have been interposed there to an illegal proceeding. Obviously the plaintiff, as trustee, executor, and legatee, as well as his coexecutors and cotrustees, were the proper parties to object to the contract and contest its legality in the probate court. This they did not do. On the contrary, without objection from any source, they asked for and secured its ratification in all respects. No claim is made that any

creditor or other legatee or devisee under the testator's will objected to the agreement, and the findings disclose that the estate, with the probate court's assent, was distributed exactly as therein provided. We do not think that the agreement was null and void, but valid. The executors, legatees, and devisees of a testator's estate, and exceptionally large estate, made up of numerous holdings of great value, and beyond peradventure solvent and fully equal to responding in all respects to the testator's gifts and the expenses of administration, including taxes, etc., get together for the express purpose of accelerating the distribution period and preserving, as far as may be done, the present worth of the property involved. The only and vitally interested owners of the residuum enter into an amicable distribution of the property they were given, each agreeing with the other that their proportionate share of whatever amount is necessary to be paid to satisfy prior bequests, costs, etc., will be paid, and then in fact acquiring and taking over said property with the assent and acquiescence of the executors, treating it as their own, receipting for its delivery in writing, paying their full share of the expense of administration, surely such a proceeding contravenes no law and exhibits no unfaithfulness upon the part of the executors in executing the trust imposed upon them by the testator's will. What the plaintiff did reflects his intention, and manifestly the purpose of this agreement was to vest title and ownership of the property in and to the parties to the same. The contract is carefully drawn, it is complete in its provisions, and what is vital was performed in toto. Subsequently, on June 18, 1918, an order of the probate court was procured authorizing distribution of all stocks. Why it was delayed is not shown. In any event, the order does not nullify the contract; it was the usual and formal proceeding, effective to prevent liability upon the executor's bond. The distribution in fact had previously been made. Agreements of this character are frequently made. It is in nowise unusual for executors to anticipate the distribution date in a will or the date fixed by law for the settlement of estates. This he may do by agreement among the heirs, or of his own mo-

tion; and if it is done, as it was in this case, the agreement is effectual, unless disturbed by some outside interests prejudiced by its terms. The Board of Tax Appeals in an exhaustive opinion so held (2 B. T. A. 921), and with this opinion we agree.

Obviously the failure to have the stock transferred from the testator's name to the plaintiff's on the books of the corporation can not affect title. In this case, as pertinently observed in the opinion of the Board of Tax Appeals, "we are not passing upon the proper method of administering estates, but upon the tax liability of the taxpayer as determined by the transactions which actually occurred." We believe the plaintiff acquired full ownership of the stock under the terms of this agreement and at the time of its execution.

The petition will be dismissed. It is so ordered.

Moss, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

RUPERT BLUE v. THE UNITED STATES

[No. E-598. Decided April 30, 1928]

On the Proofs

Income tax; sec. 213(b) (8), revenue act of 1918; exemption; compensation for active military service; officer of U. S. Public Health Service.—An officer of the U. S. Public Health Service, performing no military duty, who is not subject to military orders, and who is not paid out of an appropriation for military services, is not in the "active services" of the Army or Navy, and is not entitled to the income-tax exemption provided in section 213(b) (8), revenue act of 1918.

The Reporter's statement of the case:

Mr. M. C. Elliott for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. Plaintiff is a citizen of the United States and at all times has borne true allegiance to the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States.

II. On or about March 3, 1893, plaintiff was commissioned as an officer of the United States Public Health Service under authority of the act of January 4, 1889, 25 Stat. 639; and on or about January 13, 1912, he was commissioned as Surgeon General of the United States in charge of the Public Health Service, and continued as such until April 8, 1920, since which time he has remained in said service as assistant surgeon general assigned to special duties in the United States and foreign countries as an officer of the United States Public Health Service.

III. Within the time prescribed by law the plaintiff filed his income-tax returns for the calendar years 1918, 1919, 1920, and 1921, and claimed as an exemption in each of said returns from income tax the sum of $3,500.00 as compensation annually received by him from the United States Government for the years mentioned, for services rendered as an officer of the Public Health Service of the United States. After deducting this amount from plaintiff's income for each year, there remained a net taxable income and tax for each year as shown below, which tax was duly paid by plaintiff:

Year	Net income	Tax paid
1918	$2,626.60	$97.60
1919	3,250.88	90.04
1920	3,312.91	92.52
1921	3,299.94	91.99

IV. On or about July 22, 1922, the Commissioner of Internal Revenue disallowed the exemption of $3,500.00 annually, claimed by plaintiff, holding that plaintiff did not receive such sum as compensation for actual services in the military or naval service of the United States, and assessed against plaintiff for said years additional income taxes with interest and penalty, which plaintiff, upon demand, paid under protest, as follows:

Reporter's Statement of the Case

Year	Additional tax, penalty, and interest	Date of payment
1918	$313.32	Apr. 12, 1923
1919	257.87	Apr. 12, 1923
1920	253.85	Apr. 12, 1923
1921	238.01	Feb. 18, 1923
Total	1,063.05	

V. Thereafter plaintiff filed on or about February 23, 1925, a claim for refund for the additional taxes paid for all of said years, which claim was in the sum of $1,063.05. Said claim was rejected on or about November 30, 1925.

VI. Plaintiff has not been paid the whole or any part of the sum sought to be recovered in this action.

VII. The records of the Public Health Service do not show that the plaintiff was detailed for duty with either the Army or the Navy, or that he received any compensation during the period of the World War from either the Army or the Navy. During the period involved in this suit plaintiff's entire compensation for his official services was received from the Treasury Department.

VIII. The plaintiff as Surgeon General was the head of the Bureau of Public Health under the Treasury Department, and this bureau had charge of sanitation and health matters in territory contiguous to and surrounding the camps and cantonments, but did not have charge of the sanitation and health matters, or any other matters, within the boundaries of such camps or cantonments.

IX. On August 5, 1918, the Provost Marshal General issued the following ruling:

WAR DEPARTMENT,
OFFICE OF THE PROVOST MARSHAL GENERAL,
Washington, August 5, 1918.

From: Office of Provost Marshal General.
To: Draft executives in all States.
Subject: Amendment to section 79, note 3.

1. Section 79, note 3, is amended to read as follows:

The words "persons in the military and naval service of the United States" as employed in said act of Congress and in these regulations shall be construed as including all officers and enlisted men of the Regular Army, the Regular Army

Reporter's Statement of the Case

Reserve, the Officers' Reserve Corps, and the Enlisted Reserve Corps; all officers and enlisted men of the Navy, the Marine Corps, and the Coast Guard; all officers and enlisted men of the Naval Militia, Naval Reserve Force, Marine Corps Reserve, and National Naval Volunteers recognized by the Navy Department; all officers of the Public Health Service commissioned under authority of the act of January 4, 1889; and any of the personnel of the Lighthouse Service and of the Coast and Geodetic Survey transferred by the President to the service and jurisdiction of the War Department or the Navy Department.

Officers and enlisted men of the National Guard and National Guard Reserve not drafted into the military service of the United States, although their organizations may have been recognized by the Militia Bureau, unless and until such organizations have been specially designated by orders from the War Department to be drafted into the military service of the United States.

A. H. CROWDER,
Provost Marshal General.
By C. A. HOPE,
Captain, National Army,
Chief, Administrative Division.

Office, Provost Marshal General.
(Seal.) Official copy, War Department.

X. On or about February 28, 1919, in response to a request submitted by plaintiff for a ruling on the question whether officers of the Public Health Service were entitled to the exemption provided in section 213 (b) (8) of the revenue act of 1918, the then Commissioner of Internal Revenue, Hon. D. L. Roper, notified plaintiff in writing that "the personnel of the Public Health Service are * * * persons in the military * * * forces of the United States within the meaning of section 213 (b) (8) of the revenue act of 1918."

The said ruling of the commissioner is as follows:

"The Executive order of April 3, 1917, contains the following explicit declaration:

"'Under authority of the act of Congress, approved July 1, 1902, and subject to the limitations therein expressed, it is ordered that hereafter in times of threatened or actual war the Public Health Service shall constitute a part of the military forces of the United States, and in times of threatened or actual war, the Secretary of the Treasury may, upon re-

quest of the Secretary of War or the Secretary of the Navy, detail officers or employees of said service for duty either with the Army or the Navy.'

"Inasmuch as the present is within the language of the Executive order at times of 'actual war' it is clear that the personnel of the Public Health Service 'constitutes a part of the military forces of the United States.'

"The definition found in the act expressly declares that it shall not 'be deemed to exclude other units' otherwise included within the term 'military forces of the United States.'

"The personnel of the Public Health Service are therefore 'persons in the military * * * forces of the United States' within the meaning of section 213 (b) (8) of the revenue act of 1918."

XI. The following is a true copy of a letter from Hon. D. H. Blair to plaintiff dated November 28, 1925:

Dr. RUPERT BLUE,
% *Mr. Milton C. Elliott,*
Southern Bldg., Washington, D. C.

SIR: Reference is made to a letter dated August 26, 1925, from Mr. Milton C. Elliott, Southern Building, Washington, D. C., requesting in your behalf reconsideration of a claim for the refunding of $1,063.05, consisting of $290.12 individual income tax, $14.50 penalty, and $8.70 interest for the year 1918; $235.05 individual income tax, $11.75 penalty, and $7.05 interest for the year 1919; $238.77 individual income tax, $11.94 penalty, and $7.16 interest for the year 1920; and $238.01 individual income tax for the year 1921, which claim was rejected by the collector of internal revenue, Baltimore, Maryland, on May 19, 1925.

You are advised that all the facts and arguments presented in connection with your claim have been given careful consideration. It appears that the basis of the claim is that you should be allowed an exemption of $3,500.00 due to your position as Surgeon General in the United States Public Health Service during the years in question.

It is held that the personnel of the United States Public Health Service was not a part of the military forces of the United States within the meaning of the term "military and naval forces of the United States" contained in section 1 of the revenue act of 1918. The members thereof are not entitled to the exemption granted to such forces in section 213 (b) (8) of such act.

In view of the foregoing, the action of the collector is sustained.

A copy of this letter is being mailed to the collector of internal revenue, Baltimore, Maryland.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

XII. The Hon. D. L. Roper, as Commissioner of Internal Revenue, was succeeded by the Hon. W. W. Williams, who served in that capacity until his successor, Hon. D. H. Blair, was appointed.

XIII. The President by proclamation dated November 14, 1921, declared the war with Germany to be terminated as of July 2, 1921.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The petition avers and the proof shows that on or about March 3, 1893, the plaintiff was commissioned as an officer of the United States Public Health Service under authority of the act of January 4, 1889; that on or about January 13, 1912, he was commissioned as Surgeon General of the United States in charge of the Public Health Service and continued as such until April 8, 1920, since which time he has remained in said service as Assistant Surgeon General assigned to special duties in the United States and in foreign countries.

For each of the years 1918 to 1921, inclusive, the plaintiff filed income-tax returns as required by law and in these returns claimed an exemption of $3,500.00 out of the compensation received by him from the United States for services rendered in his official capacity. This exemption was claimed under the provisions of section 213 (b) (8) of the revenue acts of 1918 and 1921 which exclude from gross income and exempt from taxation "so much of the amount received during the present war by a person in the military or naval forces of the United States as salary or compensation in any form from the United States for active services in such forces, as does not exceed $3,500.00." The Commissioner of Internal Revenue disallowed this claim for exemption on the ground that the plaintiff was not entitled thereto under the provisions of the act above quoted. The issue in the case is whether this ruling was correct.

The plaintiff rests his claim largely upon the order made by the President under date of April 3, 1917, set forth in Finding X above, by which "it is ordered that hereafter in times of threatened or actual war the Public Health Service shall constitute a part of the military forces of the United States." The claim is made that by virtue of this order the Public Health Service constituted a part of the military forces of the United States and that plaintiff is not required to show anything further in order to entitle him to the exemption provided by the statute.

Section 4 of the act of Congress of July 1, 1902, provides:

"The President is authorized, in his discretion, to utilize the Public Health and Marine Hospital Service in times of threatened or actual war to such extent and in such manner as shall in his judgment promote the public interest, without, however, in anywise impairing the efficiency of the service for the purposes for which the same was created and is maintained."

It is insisted on behalf of the defendant that the language of the act does not confer upon the President the authority to convert the Public Health and Marine Hospital Service into the military or naval forces of the United States. and that the order of the President set out above did not have the effect of incorporating the Public Health Service into the military or naval forces of the United States. In view of the decision of the court upon another matter which is controlling in the case, we do not find it necessary to express an opinion upon this question. A reading of the statute that creates the exemption relied upon plainly shows another provision that must be complied with in order to entitle the plaintiff to the benefits of the exemption. To bring himself within the provisions of the statute, the plaintiff must show that the exemption is claimed out of a salary received from the United States for "active service in such forces." It would not, of course, be required of plaintiff that he should show that he took part, even in the smallest degree, in the activities of any of the fighting units of such forces. It would be sufficient if he participated in any of the proceedings of the military or naval forces, but the facts necessary to sustain plaintiff's case in this respect are not shown. It

does not appear that the plaintiff was detailed for duty with either the Army or the Navy, or that he received any compensation during the period of the World War from either the Army or the Navy. In the absence of being detailed to military duty, it is quite obvious that the plaintiff performed no such duty, and it is conceded that he received his compensation from the Treasury Department and not from the Army or Navy. Not having been detailed to the military forces, he was at no time subject to the orders of the military authorities. It is clear that a person who performs no military duty of any kind, who is not subject to the orders of the military authorities, and who is not paid out of the appropriation for military purposes, is not in the "active service" of either the Army or the Navy regardless of any ruling made by the former Commissioner of Internal Revenue. The ruling of the Provost Marshal General had no application to the statute in question.

The Commissioner of Internal Revenue rightly refused plaintiff's claim for exemption under this statute and his petition should be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ALBERT MILLER, E. PERCY MILLER, AND F. H. HALLOCK, COPARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF ALBERT MILLER & COMPANY, v. THE UNITED STATES

[No. B–121. Decided May 28, 1928]

On the Proofs

Contracts; general agreement; verbal purchases confirmed by formal orders; breach.—In order to keep the price of hay and forage during the war from rising beyond a reasonable figure, and at the same time secure prompt deliveries at training camps, the Government, at conferences between its representatives and representatives of hay and forage dealers generally, including plaintiffs, agreed to discontinue advertisement and proposal, in lieu thereof follow commercial practices, and to confirm all verbal purchases by formal orders. Circulars covering the

various features of the agreement were mailed to plaintiffs and other dealers, and the plan was put into practice. *Held*, that the general agreement so entered into was an essential part of every order placed thereunder, and constituted a valid contract the breach of which was ground for recovery.

The Reporter's statement of the case:

Mr. Robert T. Scott for the plaintiffs. *Messrs. Frank Davis, jr.*, and *William D. Harris* were on the brief.

Messrs. John E. Hoover and *Charles F. Kincheloe*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. McClure Kelley* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiffs, Albert Miller, E. Percy Miller, and F. H. Hallock, are partners doing business under the firm name and style of Albert Miller & Company, and engaged in the business of buying and selling hay, straw, oats, and other forage, with their office and principal place of business in the city of Chicago, State of Illinois.

II. In June, 1917, the Government of the United States, as a necessary incident to its participation in the World War, began to establish a large number of training camps throughout the United States, principally in the West and Southwest. Thousands of horses and mules were required at these camps, with the resultant necessity of large purchases of hay, straw, oats, and other forage for quick delivery. The entry of the Government into the forage market forced the price of forage to an unreasonable level. The ordinary methods of purchasing forage became impracticable, resulting in inadequate supplies of forage at some camps and congestion at others.

Conferences were held between the duly authorized officers of the Quartermaster's Department of the United States Army and many of the hay and forage dealers. At these conferences the Government officials solicited the assistance of the hay dealers to keep the price of hay and forage from rising beyond a reasonable figure and at the same time to secure prompt deliveries of adequate amounts of forage

wherever required. It was apparent that the Government's method of advertising for bids for a large quantity of forage for delivery over a long period of time would necessarily force the market to a point deemed unreasonable. No contractor could assume the risk of contracting subject to Government inspection and rejection at destination for distant future delivery at a fixed price when there was no means by which the market could be controlled.

Under Army regulations in force at that time all commodities were required to be bought on competitive bids, but the regulations provided that if the competitive bids were not satisfactory they could be rejected and in emergency cases purchases could be made on the open market. Under the existing emergency the Government adopted the plan of advertising for bids for hay, straw, and other forage, and such bids as were made at prices considered fair and reasonable were accepted. Where the prices were unreasonable, the bids were rejected and the Government went on the open market and made emergency purchases.

As a result of the conferences held between the representatives of the Government and the representatives of the hay and forage dealers, it was understood and agreed by and between the Government representatives and the hay dealers among whom were plaintiffs, that the method theretofore followed by the Quartermaster's Department of purchasing hay by formal advertisement and proposal would be discontinued and that the purchase of forage would be handled on a commercial basis, and according to the rules and custom of the trade which had been established between commercial buyers and sellers of hay and other forage; that the Quartermaster Corps would wire or telephone for quotations when hay was needed and would accept same verbally over the telephone or by wire and would designate the destination and would confirm the order by formal purchase order; that the Government would have the hay graded at destination by competent inspectors, according to the rules of the National Hay Association; the Government to furnish suitable cars at the point of origin for the transportation of said hay and forage, to give shipping instructions at the time

orders were given and to instruct the receiving railroad to place cars for the particular contract.

The rules and customs of the commercial trade, in so far as they apply to this case, are as follows:

"The inspection is to be made by competent and able inspectors, in accordance with the rules of grading existing in the trade, which are the same as the rules of the National Hay Dealers Association.

"The inspection shall be made on the day the car of hay arrives at destination.

"If rejection is made the contractor shall be immediately notified, as claims on account of rejection must be made to the original seller within thirty days from the date of sale and within ten days after rejection. Information must be given in the notice of rejection by the person rejecting the hay to enable the contractor and the original seller to determine the reasons therefor.

"Partial rejections are not allowed, unless the consent of the shipper has been first secured. The cars must be accepted or rejected in their entirety.

"The regrading of hay to a grade lower than that called for in the contract, or the repricing of hay at a price lower than that called for in the contract, is not allowed by commercial custom, unless the consent of the buyer has been first secured.

"Under commercial custom the actual weight of the hay in the car is controlling. If the consignee claims a lesser weight than that claimed by the consignor he must support his claim by a certified scale certificate. This certificate must be sent to the shipper within five days after unloading the car, in order that he may make claim against the person from whom he purchased the hay. The time fixed by commercial practice for making such claim is thirty days.

"Railroad weights are not accepted as accurate in commercial practice. Unless the hay is actually weighed as above described and evidence thereof given to the shipper, a certified invoice, scale ticket or weight certificate of the person actually weighing the hay when shipped is conclusive on the parties.

"Under commercial practice all demurrage accruing against the cars being held for inspection even though the cars are afterwards rejected, is paid by the consignee.

"Under commercial custom cars reconsigned by the consignee after receipt at the original destination to another destination are deemed to be accepted by him."

After the adoption of this plan the Quartermaster Corps advertised that it would buy hay from any person in quantities of five cars or more. All the hay and forage dealers with whom the department proposed to do business, including plaintiff, were informed that this would be the method used by the Quartermaster's Department in its future dealings with them, and the plan was embodied in a circular sent by mail to the different hay dealers. This proposal or plan was personally communicated by Major Albert B. Warren, the officer in charge of the buying of hay and grain for the forage branch of the Army, to representatives of plaintiff, and was agreed to by both parties as the basis on which they would transact business in the future. In order to carry out this plan it became necessary for plaintiff and other hay dealers doing business with the Government to make bids on quantity requirements for the various camps. When a contractor was called upon for a bid or submitted a bid and it was accepted it was later reduced by the Government to writing in the form of a letter of acceptance or in the form of a purchase order containing order number, date, shipper's name and address, grade and quality of the forage desired, the quantity, price per ton, schedule of delivery, and shipping directions. These letters of acceptance and purchase orders were supplemental to the verbal agreement originally entered into. In some cases the offer was oral and confirmed by written order. In other cases both offer and acceptance were written, and in still others the bid was written and was accepted on its face by the proper officer of the Government. There were frequent delays between the time of placing the order and the issuance of the written form; sometimes the hay would be in transit before the purchase order was received, and at other times a blank order would be issued leaving the amount and price blank.

By the terms of the oral agreement all orders were to cover periods of thirty or sixty days, not over sixty days, for the time of completion, and the Government was to pay eighty per cent of the invoice when it was attached to sight draft with bill of lading and the balance of twenty per cent was to be paid promptly on the inspection, weighing, and unloading of the hay at destination, not to exceed thirty

days from the time of shipment. In many cases the Government fell behind in both its twenty per cent and eighty per cent payments. Sometimes the Government was behind as much as sixty days on its eighty per cent payments and often many months on the twenty per cent payments.

During the period that the hay in question was being shipped the majority of the cars furnished by the Government for the shipment of hay and forage were in poor condition, having leaky roofs and doors. As a result of the condition of the cars some of the hay was damaged in shipment. Under commercial customs where the contents of a car are found damaged by reason of the condition of the car, the buyer is required to immediately notify seller, so that the seller can notify the railroad company. The railroad company requires that it be given an opportunity to verify statements as to the defectiveness of the car. The buyer must support the statement of damage as to the contents of the car by affidavit, and claims for damage on account of the condition of the car must be made within six months after the arrival of the car at its destination. The Government did not always report the condition of the cars to the contractor, and as a result of this failure the contractor was prevented from making a claim to the railroad company within the period required.

III. Prior to February, 1918, officers and enlisted men were detailed to inspect and grade hay. Many of these men had had no previous experience or training in the hay business. Serious complaints of incompetency and inefficiency were frequently made by the sellers. In February, 1918, George S. Bridge was appointed chief of the forage branch of the United States Army, and remained in that position until the latter part of 1918. For the purpose of securing competent hay and forage inspectors Mr. Bridge established a school at Chicago, where they were to be tested. Many of the men who were assigned to the forage division were unfamiliar with hay and forage. Very few of them had had any experience in inspecting hay and forage, but some of them were reared on farms and had a limited knowledge of the kind of forage produced in their respective localities. Most of the men were sent to the school at Chi-

cago to be instructed. While in Chicago they were given limited instructions by a competent hay inspector and were sent down on the tracks where hay and forage were being unloaded and watched the inspectors perform their duties. Many of these men were not in Chicago more than two or three days and but few of them were there for a period as long as a week.

The greater part of the hay on which the applicants were tested in Chicago was timothy hay, while the Government bought, and the inspectors were frequently called upon to inspect, alfalfa, prairie, red top, and other kinds and grades of hay. Some of the men examined in Chicago and found to be the best fitted for inspectors were afterwards put on other duties. The inspectors were transferred to different camps. As a general rule, men from the western country were put in eastern camps and men from the eastern country were put in western camps. As a result inspectors familiar with one kind of hay were sometimes sent to camps where the Government received grades and kinds with which they were not familiar. On account of the constant movement of troops there was a continuous changing of inspectors. Many of the inspectors were incompetent, and as a result of the incompetency many mistakes were made.

At times there was a great congestion of hay at some of the camps, and when hay was not needed many cars were rejected that were up to grade and in accordance with the specifications. On the other hand, when a camp was in need of hay it frequently occurred that inferior grades of hay were passed by the inspectors and accepted by the Government.

At times cars were accepted by one Government inspector, forwarded to a different camp, and there rejected by another Government inspector. In some cases where cars were rejected the shipper was able to get reinspection and the hay would be accepted. In a number of cases cars of hay were rejected at camps, moved into terminal markets, and sold to commercial concerns either on the grade originally sold to the Government or a higher grade.

The Government very seldom gave the contractor reason for rejection, except that it was not up to grade or some-

times was unfit for use, which reasons, under commercial custom, were not comprehensive enough to enable the contractor to make a claim against the seller. At times inspection slips and other necessary data were sent in very late, and sometimes were never sent to the Chicago office, consequently the contractor received no notice of rejection or repricing and regrading of the cars. Frequently the contractor would not be notified of the regrading, repricing, or the rejection of hay until many months had elapsed. In the meantime he had made the final settlement with the shipper and would have no recourse against him.

On account of the isolated location of the camps to which hay was shipped there was seldom any central hay market to which the rejected hay could be sent. It had to be shipped to some near-by town, where the demand was limited and the price lower. In some cases it had to be stored for a considerable length of time until a buyer could be found.

IV. Plaintiff shipped to the Government several thousand cars of hay and other forage. Of this number several hundred cars were rejected. Out of this number one hundred and ninety-three cars were up to grade and the rejections were erroneous and improper. Plaintiff sustained a loss of $38,317.22 by reason of these improper rejections.

V. The hay covered by four purchase orders, which included two hundred and seventy-four cars, was sold and delivered to Camp Custer, Michigan. Camp Custer is six miles from Battle Creek and off the main line of the railroad. On cars delivered on these four purchase orders the Government deducted from final payment voucher to the plaintiff a switching charge of $6 on each car. Afterwards the Government denied liability to the railroad to pay such switching charge and did not pay it. However, it never made a refund to the contractor. The amount thus collected from the contractor as a switching charge, which was never paid to the railroad and which is still held by the Government, is $1,644.

VI. Throughout the period covered by the contracts between plaintiff and the Government, the Government, on account of the scarcity of cars secured and furnished cars of any size for the shipment of hay on Government orders,

which plaintiff had to use. There was no agreement or understanding between the contractor and the Government that the hay was to be loaded in cars of a certain size, or that cars were to be loaded to what is commonly called the minimum carload weight. Although plaintiff loaded the cars to their physical capacity the Government charged the contractor with freight on the difference between the actual weight and the minimum weight from the original point of shipment to final destination, together with a war tax on this freight.

Notices of these deductions on account of not loading the cars up to the minimum weight did not come to the contractor until payment was made on the twenty per cent voucher, which was many months after the hay had been received at its destination. The amount of minimum or penalty freight charges which were deducted, together with the war tax assessed in this manner, was $3,824.46.

VII. Certain contracts provided for a freight-rate basis on a certain and definite amount. In cases where the contractor shipped from a point carrying a lower freight rate he was entitled to the difference, and where he shipped from a point carrying a greater freight rate he was required to pay the difference. In a few instances the contractor shipped from a point carrying a lower freight-rate basis than that specified in the contract, and the Government charged the contractor with the higher rate, amounting to $490.32.

VIII. Seven cars of hay were shipped by plaintiff and delivered to the Government for which no payment was made. It does not appear from the evidence whether these cars were rejected or what became of them. The contract price of these seven cars was $1,498.81.

IX. Some of the purchase orders carried the provision that all demurrage accruing against cars held for inspection would be paid by the Government, while others contained no such provisions. In some cases the cars were held for inspection longer than allowed by the railroads and the Government deducted $1,176.27 demurrage charges from moneys otherwise due the shipper.

X. Certain of the contracts called for hay f. o. b. Chicago. Some of this hay was shipped to points other than Chicago and there rejected. In order to get the benefit of the through rate from point of origin to destination the Government required plaintiff to reconsign the cars at Chicago. The through rate was less than the two local rates would have been. The contractor gave the Government credit for the local rate from original point to Chicago, but the Government deducted the reconsigning charges at Chicago. Contractor made a claim against the Government for the difference between local and through rates. The depot quartermaster at Chicago agreed in writing that if contractor would withdraw his claim for refund of the difference between local and through rates the Government would refund to him the reconsigning charges at Chicago. By doing this the Government gained more than if it had paid the local freight rate. This proposition was accepted by plaintiff in writing, but the Government has never refunded the charges. The amount that the Government agreed to refund is $3,565.39.

XI. Certain shipments of hay were purchased by the Government f. o. b. Canadian points. There was an import duty on hay from Canada. In some instances this import duty was paid by plaintiff at the time the hay was brought into this country. In other instances the Government paid the duty but deducted the amount from its final payments to contractor. The amount of import duty paid by plaintiff on shipments of hay bought f. o. b. Canadian points and the amount of import duty paid by the Government and deducted from the amount of final payments to contractor was $281.71.

XII. The Government appointed weighers, many of whom were enlisted men, to weigh all shipments of hay at the time they were received at the camps. Many of the men who did the weighing had not had any experience before entering upon their duties as weighers. Weights were arrived at in many ways. Some few of the camps had track scales and some camps were without any scales. Sometimes the cars were weighed coupled and while moving over the scales. Some camps used small standard scales, weighing individual bales

and then averaging the whole. Still others would weigh a few truck loads or wagon loads and average the car. At times, where they had no scales, they took the minimum car weight without weighing the car. It frequently happened in camps where they had track scales that the forage officers found the invoice weights would be less than the scale weights, in which case they would take the invoice weights. In other instances, if the railroad weights were less, they would take the railroad weights.

On shipments covered by one hundred and two purchase orders where the hay had been weighed at the time of shipment by competent and experienced weighers, the Government weights at the place of destination were incorrect and less than shipper's weights. The Government deducted for the difference between the weights as furnished by the contractor and as claimed by the Government weighers. The amount deducted on the one hundred and two shipments was $10,423.33.

XIII. The claim sued on in this action was filed with the Secretary of War under the Dent Act, but the claims board refused to entertain jurisdiction on the ground that the purchase orders were formal contracts within the meaning of section 3744 of the Revised Statutes.

The court decided that plaintiffs were entitled to recover $38,317.22 set forth in Finding IV, $1,644 set forth in Finding V, $3,824.46 set forth in Finding VI, $490.32 set forth in Finding VII, $1,498.81 set forth in Finding VIII, $1,176.27 set forth in Finding IX, $3,565.39 set forth in Finding X, $281.71 set forth in Finding XI, and $10,423.33 set forth in Finding XII, aggregating $61,221.51.

Moss, *Judge*, delivered the opinion of the court:

With the advent of the United States into the World War the necessity at once arose for the establishment of training camps throughout the country, which called for the allocation of a tremendous number of horses and mules for military use at the various camps. The regular method then in practice by the Government of advertising for bids for large quantities of forage for delivery over a long period of time was found to be impracticable. It was not possible

under that method to maintain at all times at each of the camps an adequate supply at reasonable prices. In an effort to devise a better scheme for the purchase of such forage supplies conferences were held by officers of the War Department with a number of the more important hay dealers of the country, plaintiff being among the number, and it was agreed that all supplies of hay, straw, and other forage would be purchased by the War Department according to the same method employed by private concerns and under the usual and customary rules of the National Hay Dealers Association. These customs and rules are set forth in Finding II. It was also agreed between the War Department and representatives of the Hay Dealers Association that all orders were to cover periods of thirty or sixty days for the time of completion, and that eighty per cent of the invoice when attached to sight draft with the bill of lading would be paid, and that the balance of twenty per cent would be paid on the inspection, weighing, and unloading at the point of destination, not to exceed thirty days from date of shipment. It was further agreed that defendant would furnish cars at appropriate places for the loading of the hay, and that instructions would be given the railroad company, on the line on which the shipper had delivered his hay, that cars be placed for that particular contract. The entire agreement is established in the record by the uncontradicted testimony of authorized representatives of the Government and confirmed by representatives of plaintiff who participated in the conferences. Circulars were sent to plaintiff and to all other contractors covering the essential features of the agreement, and all subsequent purchases were made in accordance therewith. Under the usual practice following the adoption of the new method, after a contractor had submitted a bid, and it had been accepted, it was later confirmed in writing by the defendant in the form of a letter of acceptance or a purchase order. Purchase orders contained the order number, the date, the shipper's name and address, the grade and quality of the forage desired, the quantity and price per ton, the schedule of delivery and shipping directions. Defendant has invoked the provisions of section 3744, Revised Statutes, and insists that the pur-

chase order with certain addenda, which will later be mentioned, constituted the contract, and that no other agreement or understanding may be considered in determining the rights of the parties. It must be remembered that the agreement under discussion was the result of numerous conferences between officials of the War Department and representatives of the large hay dealers of the country, including plaintiff. Prices of hay under the method of competitive bidding had advanced to an abnormal level with certain prospects of still higher prices. The situation in that respect could not be controlled. It was also practically impossible to maintain an adequate supply at all times at each of the camps. The occasion was extraordinary. It was in this situation that the assistance of the leading hay dealers was solicited. The technical hindrances of governmental regulations, entirely adequate in times of peace but insufficient in the emergency then existing, were summarily removed and the usual and customary rules of commercial trade—rules which were the outgrowth of years of experience in trading among individuals and private concerns—were adopted. It is stated in defendant's brief that every purchase order contained the statement that all *circulars*, specifications, and samples, pertaining to such purchase orders, and put forward by the War Department, or any of its agencies, would constitute a part of the contract. It is undoubtedly true that the vast majority of the purchase orders did contain such a statement. We have not searched the record to ascertain whether or not the statement was contained in each and every purchase order, and there is no direct testimony on this point. Assuming counsel's statement to be correct, the agreement, by express terms, became a part of every contract involved herein, for these circulars, as stated above, embodied the essence of the agreement. However that may be, the contract in controversy has been fully performed, and in determining the rights of the parties in this controversy, consideration must be given to said agreement as an essential part of the contract. *Clark* v. *United States*, 95 U. S. 542, cited with approval by the Court of Claims in the case of *Swift & Co.* v. *United States*, 59 C. Cls. 415, in a discussion

of the same general principle as that involved here, the decision in which was affirmed by the United States Supreme Court, 270 U. S. 124. (See also *St. Louis Hay Co.* v. *United States*, 191 U. S. 159.)

Plaintiff is suing for the recovery of $66,580.89 set forth in its petition as follows: Erroneous rejections, $39,-268.32; erroneous switching charges, $1,644; failure to furnish adequate cars, $3,824.46; delayed settlements, $512.26; excessive freight charges, $490.32; erroneous freight charges, $1,980.55; contracts on which payments were not made, $1,498.81; erroneous demurrage charges and war tax, $1,192.38; reconsigning charges, $3,565.39; erroneous deductions for variations in grade, $2,025.04; erroneous duty deductions, $281.71; and weight shortages, $10,297.65.

The chief item in point of amount is the alleged improper rejection of hay on the ground that it did not come up to the grade called for in the contract. Plaintiff's original records made concurrently with each transaction have been introduced into the record. It is shown that, as a rule, the hay was inspected prior to shipment and was graded as meeting the requirements of the contract. It was again inspected and regraded at the Chicago tracks by other inspectors and was certified as to quality and grade. In each instance the inspection was made by admittedly competent and efficient hay inspectors. This evidence was supplemented in many instances by the inspectors themselves who, with the aid of the original records, were enabled to testify as to the grade and quality of the hay, and have stated that it was of the grade required under the contract. The evidence offered by the Government, in support of its contention that the rejected hay did not accord with the grade called for in the contract, is unsatisfactory. In frequent instances the Government inspector testified that at a certain camp hay had been rejected because not up to the grade—that no hay which came up to the grade had been rejected by him, but on specific inquiry as to whether or not he had rejected any hay shipped by plaintiff, he was unable to give an affirmative answer. In all instances in which the hay rejected was identified by the witness as hay shipped by plaintiff, the court has eliminated

same from plaintiff's claim. The contention of plaintiff that many of the Government inspectors were inexperienced, unskilled, and inefficient is amply sustained by the evidence. The record shows that in numerous instances hay which had been rejected was resold by plaintiff as of the grade called for in the contract, and at prices equal to or greater than the prices obtaining under the contract. On a certain purchase order calling for delivery of No. 2 timothy hay, a number of cars were rejected. In the number was one car which was rejected as "musty, unfit for feed." The contract price was $27 per ton. After rejection, it was sold for $33 per ton, and this in the face of knowledge by the purchaser that it had been rejected by the Government. Another rejected car was regraded by an official board of trade inspector at Chicago at one grade higher than the contract called for. Still another car of timothy was rejected as containing fifty per cent grass. It was inspected after rejection by an experienced hay inspector, and was found to contain not over twenty-five per cent grass, which under the Government's specifications is permissible in No. 2 timothy. It was sold for $3 per ton in excess of the contract price. These are merely a few typical examples which might be multiplied many times tending strongly to sustain plaintiff's contention that rejections of hay sold and shipped by plaintiff were erroneous and unjustifiable. Plaintiff is entitled to recover on this item the sum of $38,317.22.

Plaintiff is also entitled to recover the sum of $1,644 under the following facts: Two hundred and seventy-four cars of hay were consigned to Camp Custer, Michigan, which is six miles off the main line of the railroad. The Government deducted from the final payment on this shipment a switching charge of $6 per car. Thereafter, the Government denied liability to the railroad company for such switching charges, and did not pay same, and has not refunded same to plaintiff.

In certain instances the plaintiff shipped from a point carrying a lower freight rate than that specified in the contract, and the Government charged against plaintiff the higher rate, and this item, amounting to $490.32, plaintiff is entitled to recover.

Opinion of the Court

Seven cars of hay were shipped by plaintiff and delivered to the Government for which no payment was ever made. Plaintiff is entitled to recover on this item $1,498.81.

According to commercial custom demurrage against cars being held for inspection is paid by the consignee, whether afterwards accepted or not. The Government agreed to this custom, and it was incorporated in many of the purchase orders. Certain deductions, however, were made on account of demurrage and war tax, arising under such circumstances. There is due plaintiff, on account of this item, $1,176.27.

Certain contracts designated Chicago as the f. o. b. point. A large number of cars shipped on these contracts came from different points outside of Chicago. Plaintiff paid the freight from the point of origin to Chicago, the defendant paying freight from Chicago to the camp. The through rate from the point of origin to the camp was lower than the aggregate of the two local rates. In order to receive the benefit of the lower rate from Chicago to the camp, the Government required plaintiff to reconsign the shipment at Chicago, instead of paying the local freight to that point, and then shipping as though Chicago was the point of origin. In order to accomplish this end, it was necessary to pay a reconsigning charge, which, in some instances, plaintiff paid direct to the railroads, and in other cases defendant paid and deducted same from money due plaintiff. The parties agreed in writing that the Government would pay, and the plaintiff would accept the sum of $3,565.39 in full satisfaction of plaintiff's claim growing out of this controversy. No part of same has been paid and plaintiff is entitled to recover said sum.

Certain hay was sold by plaintiff f. o. b. Canadian points, for delivery at camps in the United States. In some instances plaintiff paid the import duty, although it was under no legal obligation to do so. The Government refused to take into account such payments of duty in final payment for this hay. In other instances the Government paid the duty and deducted the amounts from its final payments to plaintiff. Under this class of shipment the Government was obligated to pay all import duties. The amount involved in this item is $281.71, and plaintiff is entitled to recover same.

The agreement provided that the hay sold to the Government was subject to inspection at destination by competent inspectors, as to both grade and weight, in accordance with the commercial rules of the trade, actual weight to control. On shipments covered by one hundred and two purchase orders, the Government weights were less than plaintiff's weights, and this difference was charged against plaintiff, and deducted, from time to time, from sums due plaintiff. This hay was weighed before shipment, and plaintiff has introduced its original records, as in the question of "erroneous rejections" hereinabove discussed, showing the actual weights under each purchase, and this evidence is supplemented in several instances by the testimony of the weighers themselves, all tending to support plaintiff's contention that the weights were correct. The inaccuracy of the weights at the point of destination is established by the overwhelming weight of the evidence, and is completely confirmed by the positive testimony of Government officials directly concerned with the transactions in controversy. Plaintiff is entitled to recover for amounts deducted on account of said difference in weights the sum of $10,423.33.

On account of the scarcity of cars, the Government secured and furnished for use by plaintiff cars of any size. There was no agreement that the hay was to be shipped in cars of a certain capacity or that cars were to be loaded to what is commonly understood in commercial usage as the minimum carload weight. Plaintiff loaded all cars to their physical capacity. The Government charged plaintiff with freight on the difference between actual weight and the so-called minimum weight from the point of shipment to final destination, together with the war tax. Notices of such deductions did not reach plaintiff until payment was made on the twenty per cent vouchers, many months after the hay had been received at its destination. This was improper, and plaintiff is entitled to recover on this item the sum of $3,824.46.

In spite of the difficulties and disagreements which finally resulted in this law suit the new method proved a distinct

success from the standpoint of the Government. An adequate supply was at all times maintained at each of the camps. The general price level was substantially reduced. Hay that cost the Government $28 and $30 per ton under the competitive-bid system was thereafter purchased for $12 per ton. There was saved the Government, according to the estimate of Government officials, not less than a million dollars a month.

There were argued with this case two other cases, *Dyer & Company*, B–119, and *Shofstall Hay & Grain Company*, B–120, involving precisely the same issues, and submitted on the evidence in the three cases. The high character and business integrity of the plaintiff in each of these cases is attested by the uncontradicted testimony of Government officials connected with the transactions involved in this litigation. The determinative facts on the more important questions involved were supplied by these Government officials.

A comprehensive statement of the situation is found in a decision of the Board of Contract Adjustment of the War Department in a claim of the Carlisle Commission Company (decisions of the War Department, Vol. VII, p. 1011) in which the facts were identical and the same contract or agreement was involved. The decision is printed as an appendix to plaintiff's brief. The statement is as follows: "The contracting officers *intended* and *endeavored at all times to carry out the terms of the oral agreement, which was the real subsisting contract; but were prevented from doing so by the force of circumstances beyond their control*, and *before they could establish an efficient organization for the performance of the Government obligation, hostilities ceased.*" (Our italics.) Plaintiff's claim in the *Carlisle case* was *allowed* and *paid*.

Plaintiff is entitled to judgment, and it is so ordered.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JAMES V. CORKERY v. THE UNITED STATES

[No. C-1140. Decided May 28, 1928]

On the Proofs

Army pay; mileage upon honorable discharge; bona fide residence.—Plaintiff having, at the time of his honorable discharge from the Army at Coblenz, Germany, June 12, 1920, elected to receive mileage from the place of discharge to his bona fide residence, he is entitled to the same under the act of February 28, 1919.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Cornelius H. Bull* and *King & King* were on the brief.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, James V. Corkery, enlisted as a private in the United States Army at Klamath Falls, Oregon, on May 18, 1917, and was discharged as sergeant, first class, Medical Department, on June 9, 1919, at Coblenz, Germany. Plaintiff reenlisted for one year on June 10, 1919, at Coblenz, Germany, and was honorably discharged by reason of expiration of term of service at Coblenz, Germany, on June 12, 1920.

II. A few days after his discharge on June 12, 1920, plaintiff accepted employment as a civilian clerk in the medical supply depot of the United States Army at Coblenz, Germany, and continued in such employment until October 7, 1920, when he reenlisted for three years as sergeant, first class.

III. At the date of plaintiff's first entry into the military service, May 18, 1917, his bona fide home was Klamath Falls, Oregon. That was also the home of his mother. Plaintiff acquired no residence elsewhere prior to June 12, 1920. His mother died previous to that time.

June 12, 1920, plaintiff had a sister living at Twin Falls, Idaho, and on being honorably discharged on that date gave

Twin Falls, Idaho, as his residence "for future reference," and elected on June 12, 1920, to receive mileage from the place of discharge to Klamath Falls, Oregon, his bona fide place of residence.

IV. The distance from Coblenz, Germany, to Klamath Falls, Oregon, is 3,660 miles.

The court decided that plaintiff was entitled to recover $175.00.

GRAHAM, *Judge*, delivered the opinion of court:

The plaintiff, an enlisted man in the Army, brings this action to recover mileage upon his honorable discharge from the service on June 12, 1920, from his place of discharge, Coblenz, Germany, to his bona fide residence at Klamath Falls, Oregon.

The applicable statute is the act of February 28, 1919, 40 Stat. 1203, which provides as follows:

"That an enlisted man honorably discharged from the Army, Navy, or Marine Corps since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably discharged, shall receive five cents per mile from the place of his discharge to his actual bona fide home or residence, or original muster into the service, at his option."

The plaintiff was originally enlisted in the military service on May 18, 1917, and was discharged as a sergeant of the first class, Medical Department, on June 9, 1919, at Coblenz, Germany. He reenlisted on June 10, 1919, at Coblenz, and was honorably discharged by reason of the expiration of his term of service, at Coblenz, Germany, on June 12, 1920. He thereafter accepted employment as a civilian clerk in the medical supply depot at Coblenz, and continued in such employment until October 7, 1920, when he reenlisted as sergeant, first class.

On his entry into the military service on May 18, 1917, he gave his bona fide home as Klamath Falls, Oregon, which was also the home of his mother, and the court has found that Klamath Falls was his bona fide residence on June 12, 1920, the date of his second honorable discharge.

It follows that under the provisions of the statute he is entitled to recover the amount claimed in his petition, for

mileage from Coblenz, Germany, to Klamath Falls, Oregon. Let judgment be entered for that amount.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice,* concur.

REGINA CLEARY MONTGOMERY, HEIR, AND RICHARD J. MONTGOMERY, MARY C. MONTGOMERY, MARGARET H. MONTGOMERY, AND JANE E. MONTGOMERY, ASSIGNEES OF ELLEN MONTGOMERY, HEIR OF JOHN J. MONTGOMERY, DECEASED, v. THE UNITED STATES

[No. 33852. Decided May 28, 1928]

On the Proofs

Patents; infringement; anticipation.—Oral testimony alone is insufficient and unreliable for the purpose of showing anticipation as against issued letters patent.

Same; pioneer invention.—(1) Unless an inventor has a patent which performs a function that was not performed before, he is not a pioneer inventor, and his claims are not to be accorded a broad construction.

(2) The courts have uniformly taken into consideration, in the construction of claims for which basic invention is claimed, the question of the general and practical utility of the device asserted to be pioneer in character.

Same; construction of claim.—Under the patent statutes the claims of the patentee define the patent, and when the language used is not obscure or ambiguous and has a settled meaning, the courts are not at liberty to enlarge the same by construing them to intend something different.

Same; Montgomery patent for aeroplane.—(1) Claims 4, 16, and 28, dealing with change in wing curvature to accomplish equilibrium and lateral control, of Letters Patent No. 831173 for aeroplane, granted to Montgomery September 18, 1906, do not cover pioneer invention, and being thus limited in scope were not infringed by the structures used by the Government known as flying boats *JN–4H* and *HS–1L*.

(2) Claims 12, 17, and 18 of said patent, directed to the arrangement of supporting and control surfaces, were not infringed by the said structures.

(3) Claims 9, 12, and 32 thereof, predicated, in addition to the foregoing, upon supporting surfaces curved parabolically, were likewise not infringed by the said structures.

The Reporter's statement of the case:

Messrs. William R. Harr and *Hervey S. Knight* for the plaintiffs. *Mr. Charles H. Bates* was on the brief.

Mr. Thomas B. Booth, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. Frederick L. Emery* and *Robert H. Young* were on the briefs.

The court made special findings of fact, as follows:

I. On April 26, 1905, John J. Montgomery, a citizen of the United States, residing in the county of Santa Clara, State of California, filed an application for letters patent of the United States for improvements in aeroplanes; and on September 18, 1906, there was granted to the said Montgomery upon said application Letters Patent No. 831173, a copy of which is filed as Exhibit A to these findings.

II. Said John J. Montgomery was the owner of said Letters Patent No. 831173 at the time of his death intestate October 31, 1911. He left as his heirs at law Regina Cleary Montgomery, his widow, and Ellen Montgomery, his mother. On January 5, 1912, his brother, Richard J. Montgomery, was appointed administrator of his estate by the Superior Court of the County of Santa Clara, California, qualified as such, and entered into and upon its administration.

On February 18, 1914, said Ellen Montgomery sold, assigned, and transferred all her right, title, and interest in and to the estate of said John J. Montgomery, deceased, including said Letters Patent No. 831173, to said Richard J. Montgomery and his sisters, Mary C. Montgomery, Margaret H. Montgomery, and Jane E. Montgomery, plaintiffs herein.

On April 10, 1914, the Superior Court of Santa Clara County, California, in the matter of the estate of said John J. Montgomery, deceased, entered a decree ordering the distribution to the plaintiffs herein of their respective shares in

said Letters Patent 831173, to wit: One-half to Regina Cleary Montgomery and one-eighth each to Richard J. Montgomery, Mary C. Montgomery, Margaret H. Montgomery, and Jane E. Montgomery, whereby said plaintiffs thereupon became joint and exclusive owners of said letters patent.

On July 27, 1914, said plaintiffs executed an instrument in writing with one Frank A. Garbutt, which instrument was as follows:

"Now, therefore, in consideration of the premises and in consideration of one dollar ($1.00) mutually in hand paid, it is agreed that in consideration of the assignment by the parties of the second part to the party of the first part of an undivided one-half (½) interest in and to the said Montgomery patent, said party of the first part will proceed to negotiate a combination between the various holders of patents in the United States who own aeroplane patents which are of value in the present condition of the art, the patents particularly referred to being the Wright patents, the Curtiss patents, the Lamson patent, and the Montgomery patent; that these negotiations will look to an amicable and complete settlement of the differences existing between the parties hereto and the holders of adverse patents, to the end that the manufacture of aeroplanes will be encouraged and a free field will be offered for the development of the art, and that the Montgomery name will be given the prominence which it deserves by reason of the priority of the application of the principles of flight by the late Prof. Montgomery, and to the end that his heirs may receive their proportionate share of the benefits to be derived from the workings of his inventions.

"The party of the first part agrees to send a party or parties East at his own sole cost and expense to carry on these negotiations and to pay all expenses of same.

"Failing in the successful prosecution of these negotiations, the party of the first part agrees to commence action or actions at law or to bring about the commencement of such action or actions at law or suit or suits in equity as in his judgment appear most advisable to accomplish the end desired and agrees to prosecute the same to a successful termination, or to the point where in his judgment he deems it inadvisable to proceed further, all such actions and suits to be at the sole cost and expense of the party of the first part.

"The party of the first part agrees to employ all legal counsel which in his opinion are or is necessary or desirable in carrying on the said litigation, and to pay all expenses incurred by him or at his instance or under his direction in connection with said litigation, and same shall not be a charge in any way upon the interests of the parties of the second part in said patent.

"Should the party of the first part determine in his judgment that the chances of success in said litigation are not sufficient to warrant the further expenditure of time and money he shall then and in that event have the right to withdraw from this contract, first giving to the parties of the second part the privilege of carrying on said matters at their own expense, and should the party of the first part so withdraw from this contract, first giving to the parties of the second part and to reassign and transfer to them the said one-half (½) interest in said patent which has previously been transferred to him, on the repayment to the said party of the first part of the money which he has expended under this contract up to date of his withdrawal."

In accordance with this instrument, two suits in equity for patent infringement were filed in California, the bill of complaint setting forth as coplaintiffs Richard J. Montgomery, Mary C. Montgomery, Margaret H. Montgomery, Jane E. Montgomery, and Frank A. Garbutt, the name of Regina C. Montgomery evidently being omitted through inadvertence.

Subsequently, under date of March 27, 1917, the following notice was served on Garbutt through Alfred J. Cleary, the duly appointed attorney in fact of the Montgomerys:

To Mr. FRANK A. GARBUTT,

Los Angeles, California:

You will please take notice that the undersigned parties, by their undersigned attorney in fact, hereby terminate and consider themselves no longer bound by the agreement entered into on the 27th day of July, 1914, or any of its terms, by and between yourself as party of the first part and the undersigned as parties of the second part.

This action is taken because of your failure to perform the terms of said agreement and because of your failure to prosecute the suit for the enforcement of patent rights No. 831173, known as the Montgomery aeroplane patent, which

patent rights were the subject matter of the above-mentioned agreement.

Dated San Francisco, March 27, 1917.

(Signed) REGINA CLEARY MONTGOMERY,
MARGARET H. MONTGOMERY,
MARY C. MONTGOMERY,
JANE E. MONTGOMERY,
RICHARD J. MONTGOMERY.
By ALFRED J. CLEARY,
Attorney in fact.

Receipt of the above notice is hereby acknowledged this ——— day of March, 1917.

No offer was at that time made to reimburse Garbutt for any money spent in connection with or any of his activities under the above instrument.

In a suit filed in the Southern District of New York, September 22, 1917, against the Wright-Martin Aircraft Corporation, for infringement of the Montgomery patent 831173, with Regina Cleary Montgomery, Richard J. Montgomery, Mary C. Montgomery, Margaret H. Montgomery, and Jane E. Montgomery as complainants, Judge Hand held the instrument of July 27, 1914, to be an assignment by virtue of which Garbutt became the legal owner of a one-half undivided interest in the patent.

An amended bill of complaint was then filed under date of October 22, 1919, by the same complainants, which amended bill made reference to a reassignment by Garbutt to the complainants in that cause, under date of August 18, 1919, in which Frank A. Garbutt sold, assigned, transferred, conveyed, and set over, remised, relinquished, and forever quit-claimed unto the plaintiffs herein each, every, and all of the several rights, titles, and interests in and to said letters patent, which rights, titles, and interests were acquired by the said Garbutt from the said plaintiffs under and by virtue of the aforesaid agreement of July 27, 1914, together with any other right or interest in and to said letters patent of which the said Garbutt might be at the date of said reassignment, or ever have been possessed; and that the plaintiffs have, since said last-named reassignment, continuously been

and now are the joint and exclusive owners of said letters patent.

This reassignment, which is not before the court, appears to have been made by Garbutt upon receipt of $1,500 as reimbursement for expenses incurred under the prior agreement.

The present action against the Government was filed September 22, 1917, or a little over two years prior to this reassignment.

III. Montgomery's first experiments on flight were begun about 1883 and continued until 1886. No laboratory or experimental records appear to have been kept by Montgomery with respect to these or subsequent experiments.

This early work was described on pages 248–249, of Progress in Flying Machines, by Chanute, published in 1894, from information obtained from Montgomery. The structures used are but vaguely described, and no basis is found in this book for the embodiments claimed in the patent in suit.

The oral testimony with respect to the early work of Montgomery also fails to establish any basis for the structures claimed.

From 1886 to 1903 Montgomery's inventive thought was turned to other investigations, and we find the following patents issued to him:

Nov. 12, 1895, British patent No. 21477, petroleum burner and furnace.

Nov. 12, 1895, German patent No. 88977, petroleum ofen.

Nov. 12, 1895, U. S. patent No. 549679, petroleum burner (application filed June 25, 1895).

Nov. 14, 1895, Canadian patent No. 50585, petroleum burner.

Feb. 19, 1901, Canadian patent No. 70319, concentrator.

July 23, 1901, U. S. patent No. 679155, concentrator (application filed June 6, 1900).

Nov. 3, 1903, U. S. patent No. 742889, concentrator (application filed Jan. 13, 1902.)

In the early part of 1903 the interest of Montgomery was renewed by meeting a man named Baldwin, who was work-

ing on dirigible balloons. Correspondence began between Montgomery and Baldwin in June, 1903, and in a letter written by Baldwin under date of November 23rd the first reference to a model is made. In this letter Baldwin states:

"Should you want any aid in the construction of your moddle [*sic*] just let me know and it will be O. K. and considered personal."

Closely following this Montgomery wrote to his mother, under date of December 15, 1903, in part as follows:

"SANTA CLARA, CAL., *Dec. 15th.*

"DEAR MA: I have just returned from Mr. Leonard's, where I performed a number of experiments with my little flying machine. I dropped it several times from a very high bridge, and it would sail beautifully and glide around and light just like a bird. Once it descended sailing around and around several times just as you have seen birds do. But the poor little thing came to disaster, and now I am making another with small steel rods instead of wood, which I shall try by raising on a big kite so arranged that when it gets about 200 feet high it will be released and let drop. In this way it will be possible to have it descend without accident. In nearly every experiment I performed the machine in sailing around would strike the timbers of the bridge or the side of a hill and break itself. Finally after making a beautiful flight it turned and came towards the foot of the bridge and sailed right into a culvert and tore itself to pieces. But in all the experiments it never turned over once. The Fathers who know about it are very enthusiastic. * * *"

Montgomery entered into an agreement with Baldwin under date of April 28, 1904, which agreement set forth in part that whereas Montgomery was the inventor of a certain flying machine, device, or contrivance for gliding and soaring through the air without the aid of gas, for the issuance of letters patent on which, when it was more fully developed and perfected and if it proved successful, he intended applying to the Government of the United States and of various foreign countries, and which said machine, device, or contrivance, if successful, would be known as the Montgomery air ship.

The agreement also provided that:

"Both parties hereto agree that they will proceed with all convenient and reasonable dispatch after this agreement is

Reporter's Statement of the Case

executed to make such trials or experiments as may be necessary to assure them that said flying machine, device, or contrivance may be successfully dropped from an ascended balloon, or from such other elevation or elevations as may be mutually fixed upon, and thence glide or soar safely to the earth, without the aid of gas, and would hence make a success for exhibition purposes; and, if said machine is not as yet sufficiently developed to answer the above requirement they agree that they will jointly proceed to develop it, so that, if possible, it may be made to answer the same; and both parties shall give to such experiments and to any such development work all of their time and attention necessary; and all the costs and expenses of said experiments and development work shall, whether said experiments prove successful or otherwise, be paid and borne by the party of the second part, without any cost or expense to the party of the first part."

Montgomery's relationship with Baldwin is summarized in the letter to his brother of May 15, 1904, which was in part as follows:

"Over a year ago there came to San Jose a celebrated balloonist and manufacturer of balloons, who made his fortune by perfecting and giving the first successful exhibition with the parachute. Accidentally he heard I had worked on flying machines. He came to see me and asked my ideas on the subject. I told him of the discoveries I had made. After a number of visits he finally told me he had been all over the world hunting for some definite idea on the subject and he said I was the first man he had met who had any definite idea regarding the laws. And he was so satisfied with my ideas that if I would put them in a practical form he would have machines made and he would test them himself. All that he wanted was a machine that he could drop safely from a balloon and which would glide gradually to the ground. With this he could give exhibitions as he did with the parachute, getting from one to three thousand dollars per week. I at first did not consider the prospect. But as he kept after me I concluded to do so. And last Christmas I made some small models and went to the coast. There I dropped the models from a wire 100 ft. high stretched between two hills and they are perfect wonders. By a special pulley, etc., I could draw them up and let them fall, sometimes with and again without any weight. I let them loose in all possible positions, in an erect position, on their backs, from the head, then from the tail and from a tip of the wing, and in every instance they would turn like a cat, then

come sailing down beautifully, it making no difference whether the wind was blowing or not.

"I gave him my report and he said these were perfection and now we are making a large one which he will try probably within the next two weeks. He says if the big machine will do half as well as the small ones we can clear over one hundred thousand dollars the first year. We have signed contracts and are working like beavers.

"And just as soon as we are satisfied he will start out, as he has his balloons and all necessary machinery ready for the purpose. He has been all over the world giving exhibitions and is fully acquainted with all pertaining to the business.

"If this very promising plan is successful we will be very well fixed."

This documentary evidence shows that after a lapse of approximately seventeen years, during which Montgomery was occupied along other inventive lines, he renewed his experiments about December, 1903, under the impetus of this contract with Baldwin. It shows that a large apparatus was under construction May 15, 1904, but throws no light on the structure of any of the small models, or the large apparatus.

The only physical exhibits offered which are alleged to have been in existence prior to the filing date of the Montgomery application which matured into the patent in suit were a part of a small pink-silk wing and a fragmentary small tandem-wing model with figured-calico wings.

These physical exhibits came into the possession of Jane Montgomery, a sister of the patentee, some time in 1905. Their history is obscure and their dates of origin unknown and their original structure is unascertainable.

There is no oral testimony regarding the structure of the 1903 models.

The next landmark in Montgomery's work was the testing of an aeroplane large enough to carry a man. This machine appears to have been assembled and tested at the ranch of Peter Cox in the summer of 1904, the tests comprising the suspension of the plane with an operator from a line stretched between two poles. The plane was further tested by men running down a steep hill and pulling the plane by

means of a rope with Montgomery riding in or holding onto the plane.

These probable tests in the summer of 1904 and subsequent tests made at the Leonard ranch in March, 1905, when a Montgomery aeroplane was cut loose from a hot-air balloon with an aeronaut named Maloney on board, as well as subsequent public tests, are immaterial in carrying back the date of invention of the patent in suit to an effective date with respect to the prior art.

In the numerous examples of prior art cited by defendant, the latest date is that of July 1, 1904, the "Delivre" date or issue date of the French Wright patent No. 342188.

No facts have been presented which show the date of invention as defined by the claims at issue of the patent in suit to be anterior to the effective dates of any of the prior art cited by defendant.

IV. Plaintiffs charge construction and use by the United States of aeroplanes embodying the subject matter of the Montgomery patent in suit, and particularly of the following claims of said patent, to wit, claims 4, 9, 12, 16, 17, 18, 28, and 32.

V. It has been agreed by the parties to this suit that the two machines known, respectively, as the *JN–4H* and *HS–1L* flying boat are illustrated by the plans and specifications furnished plaintiffs by defendant, and in evidence in this case as plaintiffs' Exhibits Nos. 114 and 115, and that said machines were in use by the United States at the time (September 22, 1917) plaintiffs' petition herein was filed.

It has also been stipulated and agreed by the parties hereto that "evidence, as to the extent of the alleged use or manufacture by or on behalf of the United States of said invention, be reserved until the court shall have determined the questions of validity and use of patent No. 831173."

VI. The object of the patent in suit is stated to be the provision of a controllable aeroplane device.

The illustrated embodiment discloses a structure having two wings or aeroplanes A and B alike in shape or contour and extent of supporting surface, and arranged in tandem upon a supporting framework.

The wing surfaces are curved fore and aft in transverse section and the best form of curvature is stated to be that of a parabola.

The wings in a fore and aft direction are given an increasing upward tilt toward the tips, producing a sinuosity in the shape of each wing. To offset the increased resistance of the more abruptly inclining outer portions, the outer portion of each wing has the front end of the ribs cut or trimmed away by an increasing amount as the outer portions of the wings are approached. The sections near the ends are therefore less sharply curved at their front ends than the forward ends of the sections nearer the center.

The rear wing is not capable of being adjusted so as to have a negative angle of incidence with respect to the front wing.

Numerous of the claims specifically call for a parabolically curved surface, while others are directed broadly to a curved wing or surface.

The patentee also states the following with respect to wing surfaces:

> "Investigation has shown me that a wing is a specially formed surface placed in such a position as to develop a rotary movement in the surrounding air. This position is determined by mathematical considerations."

Mathematically defined, a parabola is a curve produced by the intersection of a cone with a plane parallel to its side, and it is represented by the formula $y^2=2px$.

The embodiment of the invention described and illustrated is without power and is intended to function under the impetus of gravity.

One of the control features described and claimed pertains to a change in curvature of the wings. Each supporting wing is provided near its rear edges with oppositely extending transverse arms or spars, hinged at a middle point. Each spar is capable of a free swinging movement, up or down about a fulcrum provided by the underlying longitudinal frame bars.

Each spar has fastened to it a series of wires which are in turn connected to a foot bar by means of which the operator

is to manipulate the wires, and to draw down the rear portions of the wings against the upward pressure of the air, or to allow them to rise under the air pressure. This adjustment or alteration in the form of the wing surfaces, permitted by the flexibility of the wings and ribs, is termed in the claims a change in "curvature."

This control is described as follows in the patent: "By pressing down on the stirrup bar on one side the rear portions of the wing surfaces on one side are drawn down while those on the opposite side are allowed to yield to the air pressure beneath. By these means the wing surfaces change their form."

The drawings of the illustrated embodiment show a connection of the control cords contrary to this description and which would result in an inoperative structure if followed. In Fig. 6 the control cords from the rear edges of the front wings are shown as crossed. The specification also describes them as crossed. By reason of this, depressing the right-hand end of the stirrup bar will cause the drawing down of the rear of the left front wing. In Fig. 7 the control cords from the rear wings are shown uncrossed. Depressing the right-hand end of the stirrup bar would, therefore, draw down the rear of the right rear wing.

The description pertaining to Fig. 6 states that the cords are crossed; that referring to Fig. 7 merely states that the cords are guided "downwardly and backwardly."

The angle of one wing may also be varied with respect to the other wing. This is done by manipulating a cord which serves to simultaneously actuate all the control wires for both sides of the rear wing, thereby drawing or curving down the entire rear portion of the rear wing against the underlying pressure of the air, or allowing it to rise under the air pressure.

This control is for the purpose of meeting the requirements of varying speeds of motion.

For longitudinal control of the structure of the patent a large horizontal tail surface or rudder C is hinged directly to the rear of the rear wing B and is adapted to be swung vertically by means of a control cord. This tail surface is said to be but an extension of the rear wing surface.

Fixed to the horizontal tail or rudder is a large vertical fin or rudder H. This is incapable of any side movement such as that possessed by a rudder. It is fixed to and extends above and below the tail and moves up and down as the latter is swung about its hinge.

The horizontal tail provides for the longitudinal or up-and-down control, and the vertical fin, acting in conjunction with the adjustment of the wings (changing their curvature), provides for lateral control and steering to the right and left.

The operator sits astride the lower frame bar between the wings, which have a substantial space or gap between them, and places his feet on the stirrup bar.

No instructions as to the proper use or manipulation of the controls are found in the specification of the patent in suit.

In the application which materialized into the patent in suit the adjustment of the wings was originally referred to as producing a change of form of the wing surface or a change of surface.

On the first action by the Patent Office, claims 1, 2, 3, 4, 17, and 24, including as an element the said means for changing the surface of the aeroplane, were rejected on the prior art, which included patents to Boswell, 728844, May 26, 1903, and Beeson, 376937, of 1888. The applicant, in response to this rejection, amended under date of November 16, 1905, all of said claims which had been rejected on the prior art by incorporating in them phraseology to specifically designate the adjustment as effecting a change in curvature.

At the time of the said amendment, under the heading of "Remarks," there was submitted by the applicant the following statement:

"The essential distinction of this aeroplane, with respect to its capability of change of surface, is that such change is effected and lies wholly within its own integral borders, by a change in its own curvature, in contradistinction to a general angular change such as results from the relative movement of a sectional attachment like the hinged tail of the reference."

VII. In the two machines known, respectively, as the *JN-4H* and *HS-1L*, hereinafter referred to as the Government machines, the wings are superposed one above the other;

in one of the machines, the *JN–4H*, the wings are staggered, with the top one slightly in advance of the lower. The wings are of varying thickness at different points along their chord, so that the upper and lower surfaces have different curvatures, with a decreasing curvature from front to rear.

The wing design or curve used in the *JN–4H*, hereinafter referred to as the Army machine, is known as the Eiffel 36, and was determined experimentally by a French engineer named Eiffel.

The wing design or curve of the *HS–1L*, hereinafter referred to as the Navy machine, is that known as RAF6, which was developed in Great Britain.

It has not been proved that these empirical wing curves are parabolic.

The wings of the Government machines are rigid in structure, having hinged sectional surfaces at the rear edges of the wings. These surfaces, technically designated as ailerons, are capable of being given an angular change of position with respect to the wing surface. The Government machines do not simultaneously depress the ailerons at opposite sides of the wing, but provide for the depression of the aileron, or ailerons, at one side of the wing simultaneously with the reverse movement, or elevation, of the aileron, or ailerons, at the opposite side of the wings.

This movement of the ailerons is employed for balancing the machines, and the ailerons are also used in combination with a movable vertical rudder at the rear for making turns. It is possible to turn a machine to the right or left by the use of the ailerons alone, but such maneuver is contrary to conventional practice, which comprises the joint use of the vertical rudder and ailerons for turning.

The Government machines have a fixed vertical fin at the rear of the fuselage which is for the purpose of directional stability.

The Government machines have a horizontal stabilizing surface of relatively small area (about 10% of the wing surface) located at the rear of the fuselage. This is braced against both positive and negative loads and is fixed at a negative angle relative to the supporting wings, thus receiv-

ing no load in normal flight and therefore not functioning under normal conditions as a supporting surface.

In the Government machines the wings have no sinuosity, and the curvature of the front ends of all the fore and aft cross ribs is substantially the same. The only part of the wing where the front of the fore and aft wing section is less sharply curved than the front of sections nearer the center is beyond the outer rib of the wing in the extreme, small. triangular tip portion.

The Government machines are provided with motors and propellers for propulsion through the air. The motor may be shut off, however, when the machines are in the air, and the machines may then be operated or controlled while descending under the impetus of gravity.

VIII. At the time said Montgomery devised his alleged improvements, set forth in the said claims at issue in this suit, the following letters patent were in and a part of the prior art and, as shown by the file wrapper of the said patent in suit, were referred to by the Patent Office Examiner in passing on the application for said patent, and are, by reference, made a part of this finding of fact:

Country	Patentee	No.	Date	Deft.'s Ex. No.
United States	Greenough	220473	Oct. 14, 1879	49
Do	Krueger	252955	Jan. 31, 1882	50
Do	Beeson	376937	Jan. 24, 1888	53
Do	Hennig	430343	June 17, 1890	54
Do	Arbtin	462612	Nov. 3, 1891	57
Do	Hutchinson	548053	Oct. 15, 1895	60
Do	Smith	565805	Aug. 11, 1896	61
Do	Boswell	728844	May 26, 1903	69
Gr. Britain	Barton	24848	Dec. 14, 1899	66

IX. In addition to the letters patent referred to in the file wrapper of the Montgomery patent in suit, the following letters patent were also in, and a part of, the prior art at the time said Montgomery devised the said alleged improvements, and are, by reference, made a part of this finding of fact:

Country	Patentee	No.	Date	Deft.'s Ex. No.
U. S.	Marriott	97100	Nov. 23, 1869	46
Do	Lilienthal	544816	Aug. 20, 1895	59
Do	Mouillard	582757	May 18, 1897	63
Do	Lamson	666427	Jan. 22, 1901	67
Do	Tarczal	701644	June 3, 1902	68
British	Harte	1469	May 21, 1870	47
Do	Phillips	13768	Oct. 17, 1884	52
Do	do	13311	Aug. 6, 1891	56
Do	Lanchester	3608	Feb. 10, 1897	62
Do	Chanute	13372	May 31, 1897	64
Do	do	15221	June 25, 1897	65
French	Penaud & Gauchot	111574	Feb. 18, 1876	48
Do	Goupil	158220	Oct. 25, 1883	51
Do	Ader	205155	Apr. 19, 1890	109
Do	Wright	342188	Mar. 22, 1904	70
German	Schroder	77036	Nov. 11, 1893	58
Swiss	Steiger	3863	Aug. 4, 1891	55

X. In addition to the aforesaid letters patent, the following publications were in, and a part of, the prior art at the time said Montgomery devised the said alleged improvements, and are by reference made a part of this finding of fact:

	Deft.'s Ex. No.
L'Aeronaute, published at Paris, January, 1872, pages 2 to 9, inclusive, article by A. Penaud entitled "Aeroplane Automoteur"	72
La Locomotion Aerienne, by A. Goupil, published at Charleville, France, in 1884, pages 101, 103, 104, and Plates VI and VII	73
Twenty-third Report of the Aeronautical Society of Great Britain, published at Greenwich, England, in 1888, pages 65 to 69, inclusive, article by Horatio Phillips	74
Der Vogelflug als Grundlage der Fliegekunst, by Otto Lilienthal, published at Berlin, in 1889, pages 70 to 102, inclusive, pages 136 to 154, inclusive, pages 177 to 182, inclusive, and Plates I to VIII, inclusive	75
Experiments in Aerodynamics, by S. P. Langley, published at Washington in 1891, pages 26 to 47, inclusive, and 105 to 108, inclusive	77
Revue de L'Aeronautique, published at Paris in 1893, pages 69 to 99, inclusive, and Plates XII to XV, inclusive, article by M. C. Ader entitled "L'Aeroplane 'Eole'"	110
Scientific American Supplement published at New York, June 3, 1893, pages 14, 258, and 14, 259, article entitled "Phillips' Flying Machine"	78
Proceedings of the International Conference on Aerial Navigation, published at New York in 1894, pages 11 and 21 to 38, inclusive, 81 to 83, inclusive, 253 to 264, inclusive, and 273 to 287, inclusive, containing, respectively, papers by C. W. Hastings, S. P. Langley, W. Kress, and A. F. Zahm	79

	Deft.'s Ex. No.
The Aeronautical Annual for the years 1895, 1896, and 1897, published at Boston, Mass., in the respective years named	80
McClure's Magazine for June, 1897, published at New York City, June, 1897, pages 647 to 660, inclusive, article by S. P. Langley entitled "The 'Flying Machine'"	81
Journal of the Western Society of Engineers, published at Chicago, Ill., October, 1897, Vol. II, No. 5, pages 593 to 628, inclusive, article by Octave Chanute, entitled "Gliding Experiments"	82
McClure's Magazine for June, 1900, published at New York City, June, 1900, pages 127 to 133, inclusive, article by O. Chanute, entitled "Experiments in Flying"	83
Annual Report of the Board of Regents of the Smithsonian Institution for the year ending June 30, 1900, published at Washington in 1901, pages 197 to 216, inclusive, article entitled "The Langley Aerodrome"	84
Scientific American, Volume LXXXIV, No. 9, published at New York City, March 2, 1901, page 137, article entitled "The Kress Aeroplane"	85
Journal of the Western Society of Engineers, Vol. VI, No. 6, published at Chicago, Ill., December, 1901, pages 489 to 510, inclusive, article by Wilbur Wright entitled "Some Aeronautical Experiments"	31
Flying, No. 2, published at London, March, 1902, pages 53 to 60, inclusive, article by Sidney H. Hollands entitled "Motor Aviation of To-day and of Recent Years"	86
Illustrirte Zeitung, published at Berlin, March 5, 1903, page 351, illustrated article on flights of the Wright brothers	87
La Locomotion, published at Paris, April 11, 1903, pages 225 to 227, inclusive, illustrated article on flights of the Wright brothers entitled "M. Chanute a Paris"	88
L'Aerophile, published at Paris, April, 1903, pages 81 to 86, inclusive, illustrated article on the flights of the Wright brothers entitled "Dinner Conference du 2 Avril, 1903"	104
L'Aerophile, published at Paris, August, 1903, pages 171 to 183, inclusive, article entitled "La Navigation Aerienne aux Etats-Unis," by Chanute	34
Wiener Luftschiffer-Zeitung, published at Vienna in August, 1903, pages 173 and 174	89
Journal of the Western Society of Engineers, published at Chicago, Ill., in August, 1903, containing an address by Wilbur Wright entitled "Experiments and Observations in Soaring Flight"	30
Scientific American, Vol. LXXXIX, No. 16, published at New York City, Oct. 17, 1903, page 272, illustrated article on the Langley machine	90

Opinion of the Court

	Deft.'s Ex. No.
American Inventor, Vol. IX, No. 9, published at Washington, Nov. 1, 1903, pages 208 and 209, illustrated article entitled "The Langley Flying Machine"	91
Revue Generale des Sciences, published at Paris, November 30, 1903, pages 1133 to 1142, inclusive, illustrated article by O. Chanute entitled "L'Aviation en Amerique"	92

And

Progress in Flying Machines, by Chanute, published at New York City in 1894, plaintiffs' Exhibit No. 79.

XI. At the time Montgomery devised his alleged improvements, set forth in the patent in suit in the aforesaid claims at issue, the following structures were in, and a part of, the prior art:

1. Aeroplane glider, constructed in the United States by the Wright brothers and put into use at Kitty Hawk, North Carolina, in 1900.

2. Aeroplane glider, constructed in the United States by the Wright brothers and put into use at Kitty Hawk, North Carolina, in 1901.

3. Aeroplane glider, constructed in the United States by the Wright brothers and put into use at Kitty Hawk, North Carolina, in 1902.

4. The Wright glider of 1902, as altered and put into use at Kitty Hawk, North Carolina, in the summer of the same year.

5. The motor-driven flying machine of 1903, constructed in the United States by the Wright brothers and put into use at Kitty Hawk, North Carolina, on December 17, 1903.

The court decided that plaintiffs were not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This is a patent case. The petition alleges that under the act of June 25, 1910, 36 Stat. 851, plaintiffs are entitled to recover for an infringement by the Government of claims 4, 9, 12, 16, 17, 18, 28, and 32 of Letters Patent #831173 granted on September 18, 1906, to John J. Montgomery, now deceased. The Government denies infringement and challenges the validity of the patent.

A preliminary question of title is called to our attention. On July 27, 1914, the plaintiffs assigned an undivided interest in the patent to Frank A. Garbutt. The consideration for the assignment was a duty imposed upon Garbutt to attempt to reconcile the conflicting claims of Montgomery with other inventors in the same art and procure for the Montgomery patent a sufficient recognition to entitle the owners of the patent to realize its worth in money; failing in this, to institute suits for infringement of the patent. Garbutt did commence two suits, both were dismissed without prosecution to a conclusion, and subsequently, i. e., after this suit was commenced, Garbutt reassigned his interest in the patent to the plaintiffs. We think in view of the result of this suit that the contention of the defendant is unimportant.

The petition alleges infringement of claims 4, 9, 12, 16, 17, 18, 28, and 32 of Montgomery's patent. There are forty-six claims in the Montgomery patent.

The plaintiff's case is predicated largely upon a contention that Montgomery, the patentee, was a pioneer in the art and his patent a basic patent; that he was the first to invent the principle of wing warping to secure equilibrium and lateral control essential to flying; that the other elements of his machine disclose the principles of stability and rudder control, all of which, or their equivalents, are embodied in the Government machines, offered as exhibits of infringing devices. The record in the case is most voluminous and involved and has required exacting attention and labor. The first vital issue depends upon whether from the record it is to be held that Montgomery was a pioneer inventor and his device a basic patent. If so, his claims, as repeatedly adjudicated, are to be accorded a broader construction than were the situation otherwise. Unless it may be said and established by proof that the inventor has a patent which performs a function which was not performed before, he is not entitled to be designated a pioneer inventor. *Westinghouse* v. *Boyden Power Brake Co.*, 170 U. S. 537.

Attempts to construct flying machines did not, of course, originate with Montgomery. The art is old, its progress was slow, the early development crude and impracticable.

Opinion of the Court

Inventors many decades ago studied the flight of winged animals and sought without success to imitate their motions and bring into being a device that would accomplish, with the aid of man, what flying birds, eagles, vultures, etc., did with natural ease. This record is replete with a large number of exhibits, publications, and patents which antedate Montgomery by years, disclosing the extent of sustained interest in the art, and efforts made to accomplish flying in a heavier-than-air machine.

Montgomery first centered his attention upon the subject in 1883; from this date until 1886 he conducted a number of experiments with some sort of a mechanism designed as a "glider." He does not seem, at this time at least, to have conceived the idea of soaring from the ground and remaining aloft in a device under control. What he was attempting was the construction of a machine that might be released from high altitudes and glide safely to earth under control. From 1886 until 1903 Montgomery turned his attention to other and distinct inventive fields; he contributed nothing to this particular art during this period. In 1903 he renewed his experiments. During that year he came in contact with one Baldwin, a balloonist, who had been making successful glides from a hot-air balloon in a parachute. Baldwin became interested in Montgomery's efforts and the two entered into a contract, whereby Montgomery was to construct his device, and if it proved successful in descending from a balloon with a man on board the two were to engage in public exhibitions and divide the profits. Montgomery and Baldwin disagreed before any actual experimentation with the prospective glider obtained, and Montgomery thereafter entered into a somewhat similar contract with another balloonist. Montgomery had constructed in May, 1904, a large machine to meet the requirements of the Baldwin contract, and in the summer of 1904 carried on some experiments at the ranch of Peter Cox, in California. The exact and detail structure of his machine is not disclosed. The experiments made consisted in elevating the machine to a desired height by suspending it from a wire to which it was attached, stretched between two upright

poles. At the proper time it was released to ascertain its gliding qualities. Other tests were made by resorting to a steep hill, when men, by means of a rope, pulled it down the incline, Montgomery holding onto the device. Just how many and the exact character of the tests so made is impossible of determination. It is sufficient to observe that they were quite numerous. In March, 1905, Montgomery attached his machine to a hot-air balloon. and having secured the services of an aeronaut by the name of Maloney to make the test the machine with Maloney in the saddle seat was released from the balloon at a high altitude and safely glided to earth. On July 8, 1905, Maloney attempting the same experiment lost his life, the machine failing to function.

On April 26, 1905, Montgomery filed his application for the patent in suit. The patent was granted on September 18, 1906.

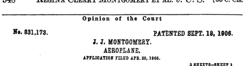
We have epitomized Montgomery's early efforts, with respect to which a great volume of proof has been adduced, solely because the plaintiffs have sedulously insisted that the facts are sufficient to antedate the effective date of invention to a time which would exclude reference to certain prior art. A careful analysis of the record upon this point is conclusively convincing that the proof signally fails to sustain the contention. Out of fifty-two prior patents and publications cited in the record all but eight bear dates which make them statutory bars, provided they disclose the structure of the patent in suit. The courts have uniformly held that to show anticipation as against issued letters patent some drawing, some model, some positive means of identification must appear. Oral testimony is regarded as insufficient and unreliable for this purpose. Without exception it is to be discarded, for, however free from intentional misrepresentation, it is uniformly tinctured with the interest of the parties in the litigation and necessarily characterized with acute limitations of the possibility of particular and precise descriptions of the device and its comparison with another. *Symington Co.* v. *National Malleable Castings Co.*, 250 U. S. 383; *Deering* v. *Winona Harvester Works*, 155 U. S. 286; *The Barbed Wire Patent*, 143 U. S. 275; *Torrey*

v. *Hancock*, 184 Fed. 61; *Emerson & Norris Co.* v. *Simpson Bros. Corp.*, 202 Fed. 747.

The flight of April 29, 1905, took place three days after Montgomery's application for a patent was filed, and is available solely as proof on the point of operativeness.

It is impossible from the record to abstract with any degree of accuracy the detail structure of Montgomery's early machines. He preserved no data, kept no record of measurements, and left no reliable information from which a court or one skilled in the art might profit from what he did, or ascertain the means he employed to do it. At best, the evidence is probative on the single point that the patentee did on the dates stated do the things described, and discloses only the happening of the chronicled events. True, Chanute in 1894, in his book Progress in Flying Machines, devotes an article to Montgomery's experiments, in which he outlines in general terms the Montgomery machines, from which one may abstract a conception of general lines of construction; however, it is clear from what was therein said, and the results of the tests described, that it would be hazardous indeed to ascribe to Montgomery a distinct conception at this time of those fundamental principles of aerodynamics, which finally culminated in the invention of the airplanes which it is now claimed infringe the patent in suit. If, however, Chanute's article did disclose the specific features of Montgomery's device, then the article itself stands as a statutory bar to the validity of the patent. Montgomery's articles and addresses printed in the record found publication years after his application for the present patent had been filed and granted, and are purely *ex post facto*.

There are 46 claims in the Montgomery patent. Infringement is alleged as to claims 4, 9, 12, 16, 17, 18, 28, and 32. The device claimed is manifestly a combination of elements designed to function in certain ways. Fig. 1 of the patent illustrates a side elevation of the patented machine. We reproduce it from the letters patent:



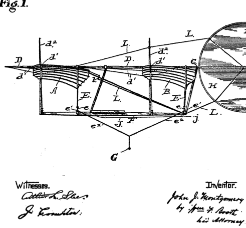
No. 831,173. PATENTED SEPT. 18, 1906.

J. J. MONTGOMERY.

AEROPLANE.

APPLICATION FILED APR. 26, 1905.

3 SHEETS—SHEET 1.



To fly in a heavier-than-air machine, one capable of bearing aloft a man, exacted the creation of a device that would function in a variety of ways. First, it must be capable of soaring from the ground. Second, equilibrium when aloft was indispensable. Third, directional control was equally essential. Fourth, stability must be accomplished, and finally, the means to descend when desired was no less important. Soaring, equilibrium, control, and gliding were concededly indispensable. Noted scientists from an early date discovered the above requisites if a successful flying machine was to materialize. The difficulties encountered

were not so much in the discovery and recognition of the principles involved, although tedious and prolonged, as in the means available to apply them in a practical manner.

The claims of the Montgomery patent which disclose the invention we think may be grouped. First, those which are directed toward the accomplishment of equilibrium and lateral control, dealing especially with a change in wing curvature to accomplish the purpose. This group, we think, comprehends claims 4, 16, and 28. Claim 16 being typical and most comprehensive of the group we quote it at this point:

"A curved aeroplane with means for changing its curvature, and a horizontal tail behind, which means for swinging it vertically."

The second group may be said to be directed to the relative arrangement of the supporting and control surfaces, and would include claims 12, 17, and 18. Claim 17 we regard as typical of this group and therefore quote it:

"In an aeroplane device, plural curved aeroplanes one in advance of another, and a horizontal tail-surface behind the last aeroplane with means for swinging said tail-surface vertically."

The third group is made up of certain claims which, in addition to the foregoing, are predicated upon or limited to a specific type or character of supporting surfaces, defined in the claims as "curved parabolically." In this group we place claims 9, 12, and 32. Claim 9 we regard as typical and quote it:

"An aeroplane curved parabolically from front to rear, its front portion being rigid, and its rear portion adjustable, with means for adjusting said rear portion relatively to the front portion, to change the surface of the aeroplane."

Originality and novelty ascribed to the first group reside in the alleged fact that the claims disclose a form of construction whereby through a change in the curvature of the wings, integral with the wing surfaces, equilibrium and lateral control of the machine in flight are secured. Wing surfaces on planes enable the airplane to soar; they furnish, through the reaction of air currents, the "lift" and support;

when once aloft they function to maintain equilibrium and lateral control, the vital necessity for which is obvious. If the operator desires to turn in either direction, or the lateral equilibrium of his plane is disturbed, he may accomplish the former and retake the latter by a process of change in the wing surface. Montgomery, securing the front portion of his wings rigidly and unmovable to his structure, so adjusted the rear portion relatively to the front portions as to change the surface of his wings by a change in their curvature. He did, by the application of a control device, make it possible to lower one side of the rear portion of his wings, which at the same time functioned to permit the other side of the rear portion to rise and thereby evolved this principle of wing warping. This was accomplished without changing angularly the wing surface, and the claimed novelty resides in making the change of curvature integral with the wings themselves, i. e., the wing itself responded to the movement without the introduction of hinged ailerons. The result was a change in the rear cambered sections of the wings and offered to air currents the essential characteristics of an increased lift upon one side of the plane and a decreased lift on the other, enabling the airplane to turn in either direction.

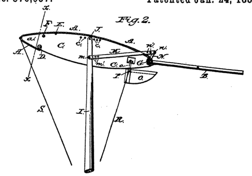
Montgomery was not the first to recognize or avail himself of the principle of changing the form of wing surface to attain the desired results. On the contrary, he encountered at the outset of his application for a patent two prior patents embodying the conception and was compelled to limit his claims to avoid the patented structures. Beeson on January 24, 1888, secured a patent for a structure illustrated by the following device:

(No Model.) 2 Sheets—Sheet 2.

W. BEESON.

FLYING MACHINE.

No. 376,937. Patented Jan. 24, 1888.



Beeson relied upon a curvel plane, to the rear portion of which he hinged an elongated element functioning upwards and downwards, which manifestly served to angularly vary the surface of his wing.

Boswell's patent, illustrated by his Fig. 1, which we reproduce, disclosed a conception of the structure embodied in certain of Montgomery's claims as filed. Boswell's structure also obtained an angular change in wing surface.

The Commissioner of Patents rejected the patentee's claims 1, 2, 3, 4, 17, and 24 upon the patents cited above. Montgomery submitted amendments in answer to the rejections, in which he said:

"The essential distinction of this aeroplane with respect to its capability of changing surface, is that such change is effected and lies wholly within its own integral borders, by a change in its own curvature, in contradistinction to a general angular change such as results from the relative movement of a sectional attachment like the hinged tail of the reference."

Opinion of the Court

We need not indulge citation to disclose the legal effect of this proceeding.

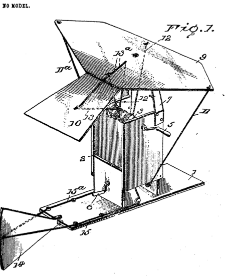
No. 728,844. PATENTED MAY 26, 1903.

L. A. BOSWELL.

STEERING MECHANISM FOR DIRIGIBLE AIR SHIPS.

APPLICATION FILED SEPT. 24, 1901.

NO MODEL.



From the Revue de l'Aéronautique, vol. 4, published at Paris in 1893, we cite the following quotation:

"It is known that the characteristic of a spiral is to turn about a center from which it is always receding and (fig. 27) that all tangents, at no matter what point of the curve, form similar angles with the radius; it is thus possible to trace spirals of greater or less curvature.

"This curvature is indispensable to a moving surface to enable it to obtain the maximum support in the air. It is also applicable and indispensable to individual feathers and to the propeller blades.

"It may be termed the universal sustentation curve of flight and support in the air.

"The arching, as regards the degree of curvature of the concavity of the wings, will vary according to the speeds and loads, but without ever losing the character of a spiral. For all wings, without exception, small or large, the central or starting point C of the spiral curve coincides with the front of the wing; the Figures 26 and 27, representing two absolutely similar spirals, afford an example of this. On that of Fig. 26 is seen a full line which shows the shape of a large wing; on Fig. 27 the full line represents another wing, but much smaller. The horizontal lines H indicate the direction of translation. The same wing may change its degree of curvature during flight, but it will be only a modification of the spiral.

"II. Laws common to all wings

"All wings, of whatever shape and nature they be, must obey the same laws. It can not be otherwise, because the difficulties of locomotion in the atmosphere especially when the latter is disturbed, and the manoeuvres of starting from and landing on the ground will be the same for all aerial machines. Aeroplanes will also inevitably undergo great changes in their weight through the consumption of fuel or by being lightened if they let fall any part of their load to the earth.

"From all this arises the necessity of being able to guide or to retard or accelerate the speed of translation. And to be able to attain this end it is necessary that the wings should be capable of making four principal movements during flight:

"1. To be moved forwards or backwards in their entirety.

"2. To be folded up, so as to diminish or extend their surface.

"3. To be warped.

"4. To vary at will the curvature of the universal curve.

"All the combinations of frameworks, of articulations, of tendons and membranes are made with this end in view.

"Because of the great difficulties which accompany the question of speed, we have been obliged to make wings for slow speed and high speed machines."

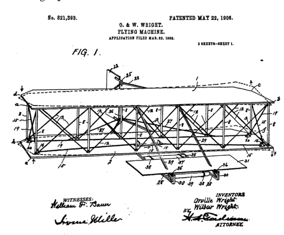
Opinion of the Court

Lilienthal in 1895 demonstrates in his Letters Patent #544816 a distinct conception of the value and functioning of curved wings in a flying machine.

Lilienthal was a distinguished engineer and scientist; he successfully accomplished thousands of glides, gave to the art publication of his experiments, and is prominently recognized by more than one outstanding scientist as contributing to the art most vital and necessary principles of the way in which air currents may be utilized in flying machines.

On May 26, 1906, Orville Wright and Wilbur Wright, of Dayton, Ohio, received their patent #821393. The two Wrights first became interested in aviation in 1896. They were close students of the science, and early in their careers became convinced that equilibrium and control were the vital factors to be obtained if a heavier-than-air machine was ever to materialize. To this end they devised in July, 1899, a method of twisting or warping wing surface. A model was constructed along this line, a model clearly disclosing the conception of shifting one wing surface forward or back relatively to the other, and warping them by the same movement. This model was tested and responded satisfactorily. In 1900 the Wrights constructed a man-carrying model and it was tested at Kitty Hawk, North Carolina, in September and October, 1900. This particular machine, a glider, speaking now of wing surfaces, was so constructed that adjustments connecting the wings by flexible joints with upright posts, enabled the operator, "lying prone in a cradle," to actuate a wing warping effect by the sidewise movement of his body. The machine was flown a number of times with an operator on board during some of the flights, and without one at other times. It is true that the wing warping was accompanied by changing the relative position of the wings in flight, and not in the precise manner the patent in suit at a later point of time disclosed; but the demonstration of the effectiveness of the principle was firmly established. Lateral control and equilibrium were obtained for the first time effectively, leaving open to subsequent inventors the solution of a better method, if possible, to obtain the identical result. The Wrights, so far as the record herein is concerned, were the first to construct a device which suc-

cessfully functioned in the desired way. The Wrights were assiduous in experimentation. In July, 1901, at Kitty Hawk tests of a larger machine were made in the presence of a number of persons, including one very distinguished scientist. These tests involved a number of flights, and many of them were decidedly successful. Without recounting in detail the number of tests made by the Wrights, and the success which followed their scientific and laborious investigation of the art, it is sufficient to state that on December 17, 1903, the Wrights demonstrated the possibility of successful flying in a heavier-than-air machine, motor driven, carrying and subject to the control of a living operator. This machine soared from the ground, demonstrated the possibility of control in sustained flight, and glided safely to earth in response to the operator's desire. The significance of the Wright invention is disclosed by the following figure reproduced from the Wright patent:



Opinion of the Court

Among the specifications accompanying the Wright patent are the following ones applicable in part to wing warping:

"A hem is formed at the rear edge of the cloth to receive a wire 7, which is connected to the ends of the rear spar and supported by the rearwardly extending ends of the longitudinal ribs 5, thus forming a rearwardly extending flap or portion of the aeroplane. This construction of the aeroplanes gives a surface which has very great strength to withstand lateral and longitudinal strains, at the same time being capable of being bent or twisted in the manner hereinafter described.

"When two aeroplanes are employed, as in the construction illustrated, they are connected together by upright standards 8. These standards are substantially rigid, being preferably constructed of wood and of equal length, equally spaced along the front and rear edges of the aeroplane, to which they are connected at their top and bottom ends by hinged joints or universal joints of any suitable description. * * * It will be seen that this construction forms a truss system which gives the whole machine great transverse rigidity and strength, while at the same time the jointed connections of the parts permit the aeroplanes to be bent or twisted in the manner which we will now proceed to describe. * * *

"The part of the rope 15 under tension exercises a downward pull upon the rear upper corner *d* of the structure and an upward pull upon the front lower corner *e*, as indicated by the arrows. This causes the corner *d* to move downward and the corner *e* to move upward. As the corner *e* moves upward it carries the corner *a* upward with it, since the intermediate standard 8 is substantially rigid and maintains an equal distance between the corners *a* and *e* at all times. Similarly, the standard 8, connecting the corners *d* and *h*, causes the corner *h* to move downward in unison with the corner *d*. Since the corner *a* thus moves upward and the corner *h* moves downward, that portion of the rope 19 connected to the corner *a* will be pulled upward through the pulley 20 at the corner *h*, and the pull thus exerted on the rope 19 will pull the corner *b* on the other side of the machine downward and at the same time pull the corner *g* at said other side of the machine upward. This results in a downward movement of the corner *b* and an upward movement of the corner *c*. Thus it results from a lateral movement of the cradle 18 to the right in Fig. 1 that the lateral margins *a d* and *e h* at one side of the machine are moved

from their normal positions in which they lie in the normal planes of their respective aeroplanes, into angular relations with said normal planes, each lateral margin on this side of the machine being raised above said normal plane at its forward end and depressed below said normal plane at its rear end, said lateral margins being thus inclined upward and forward. At the same time a reverse inclination is imparted to the lateral margins *b c* and *f g* at the other side of the machine, their inclination being downward and forward. These positions are indicated in dotted lines in Fig. 1 of the drawings. A movement of the cradle 18 in the opposite direction from its normal position will reverse the angular inclination of the lateral margins of the aeroplanes in an obvious manner. By reason of this construction it will be seen that with the particular mode of construction now under consideration it is possible to move the forward corner of the lateral edges of the aeroplane on one side of the machine either above or below the normal planes of the aeroplanes, a reverse movement of the forward corners of the lateral margins on the other side of the machine occurring simultaneously. During this operation each aeroplane is twisted or distorted around a line extending centrally across the same from the middle of one lateral margin to the middle of the other lateral margin, the twist due to the moving of the lateral margins to different angles extending across each aeroplane from side to side, so that each aeroplane surface is given a helicoidal warp or twist."

The claims of the patent, 18 in number, disclose clearly the structure specified. Beyond dispute is the established fact from evidence of not only oral witnesses but many written documents that the Wrights did embody in their aeroplane a complete conception of and means for imparting to the rear portions of an aeroplane wing a change therein which was intended to and did function to "present to the atmosphere different angles of incidence," and "were capable of being moved to different angles relatively to the normal plane of the body of the aeroplane."

In view of the extent of the prior art evidenced by granted patents and the innumerable publications part of the prior art, a subject much too voluminous to discuss in detail, it seems to us idle to contend that Montgomery was a pioneer in this particular field. A change in the surface of aeroplane wings, a change of curvature to effect equilibrium and control in flight, were among the very first principles recognized

by a long list of preceding inventors and scientists, many of whom gave to the art the benefit of thousands of experiments and disclosed most valuable data long before Montgomery invented his device. The necessity for a curved wing surface and means of changing the same is illustrated in more than one patent, the inventors clearly conceiving the importance of this form of construction to obtain the reactions of air currents.

If more is needed to preclude the allowance of a broad construction of the patentee's claim, we think it is to be emphatically found in an article published in McClure's Magazine in June, 1897, by Professor S. P. Langley. This article contains not only a disclosure of wing construction as embodied in Langley's experimental devices, but exhibits by various photographs a completed device resembling closely the patent in suit, i. e., two wing surfaces, mounted in tandem fashion upon a long steel supporting rod, each slightly curved, at the rear of which appears a rudder adapted both for vertical and horizontal steering, a concrete demonstration of the fact of not only the prior existence of a flying device constructed in form and fashion as the patentee constructed his device, but following in the footsteps of practically all prior inventors in the use of curved wing surfaces.

Montgomery's patented device was not received commercially; none of his machines were ever sold or met with any public demand. The patent was never put to any practical use, and, so far as the record discloses, inventors active in the art as well as the public generally did not accord the machine that full measure of inventive recognition usually attendant upon a pioneer patent. The courts have uniformly taken into consideration, in the construction of claims for which basic invention is claimed, the question of the general and practical utility of the device asserted to be pioneer in character. The Supreme Court in the case of *Deering* v. *Winona Harvester Works*, 155 U. S. 286, 295, used this language: "If Olin had been the first to devise a contrivance of this description for adjusting the flow of grain upon the main elevator, it is possible that, under

the cases of *Ives* v. *Hamilton*, 92 U. S. 426, and *Hoyt* v. *Horne*, 145 U. S. 302, a construction broad enough to include defendant's device might have been sustained. But in view not only of the prior devices, but of the fact that his invention was of doubtful utility and never went into practical use, the construction claimed would operate rather to the discouragement than the promotion of inventive talent. Not only does it appear that the device described in this patent did not go into general use, but that the mechanism set forth in the patent to Bullock & Appleby of October 31, 1882, under which the defendants manufactured their machines, was extensively sold throughout the country for about eight years before any assertion of adverse right under the Olin patent." To the same effect are the following cases: *Boston Woven Hose & Rubber Co.* v. *Pennsylvania Rubber Co.*, 164 Fed. 557; *Henry* v. *City of Los Angeles*, 255 Fed. 769, 780.

The sequential history of the art circumscribed the opportunity for inventive genius as to the construction of wing surfaces at the time Montgomery designed his structure. The latitude for novelty in this respect was limited to *sui generis* forms and modes of adjustment. The necessity for curved wings and wing warping had been anticipated. It had been successfully demonstrated in an empirical way, and was distinctly recognized as an established principle of aeroplane flight, so that Montgomery, as the history of his application for and allowance of patent expressly discloses, was limited to the precise disclosure of his claims in this respect. Preceding 1905, inventors were active in the art. Intensive study and experimentation were in progress on a large scale, and the record absolutely precludes the possibility of assigning to Montgomery more than his claims specifically call for, and to that precise limitation we think his patent is restrained, including the claims grouped in group one. The defendant furnished the plaintiffs with plans and specifications of two flying machines, illustrative of the character of machines being used by the Government at the time the petition herein was filed. Both parties have used and relied upon these machines as determinative of the

issue of infringement. They are known in the record as Exhibits #114 and 115, the latter being known as the "flying boat."

The plaintiffs contend, quoting from one of their expert witnesses, that in both Government machines "the wing surfaces have a curvature and are not of flat plate. They are a refinement of the parabolic or cambered wing principle. The wings have hinged ailerons at their rear parts, giving a variable curvature to the wing, the front portion remaining rigid, which is similar to and identical in principle with what the Montgomery patent provides for." Taking the above contention literally, as expressed above, it is apparent that the wing surfaces of the alleged infringing airplanes are not the exact counterpart of those claimed in the patent. Obviously, the wing surfaces of the Government planes are not curved parabolically. The Government wings are not identical in contour with respect to top and bottom, and the change effected in their surfaces is an angular change brought about by "hinged ailerons" on their rear portions. The patentee was compelled to amend his claims by the examiner of the Patent Office to escape anticipation predicated upon hinged ailerons, and while the functioning element of hinged ailerons secures equilibrium and lateral control, the method adopted is quite distinct from that disclosed in Montgomery's claims. The Government planes present no refinement of the parabolic principle. On the contrary, the completed wing structure discloses a perceptible divergence in both contour and breadth of construction. Montgomery's wing surfaces were precisely the same on both top and bottom; there was no variance of contour; the cambered sections were identical, and being constructed out of a single layer of canvas obtained no variance in breadth. It is true the Government planes are rigid in their front portions, but the process of change of wing surface is not in any respect identical with Montgomery's specifically claimed method of a change of curvature integral within the wing itself. We are unable to perceive the possibility of reading plaintiffs' claims which call for a change of curvature in the plane surface upon the Government structure.

The second group of claims covers specifically the relative arrangement of supporting and control surfaces. Montgomery mounted upon his structure two wings arranged in tandem fashion; to the immediate rear of the second wing a large fin, practically semicircular in form, intersected midway by a smaller vertical plane, was so mounted and adjusted relatively with the control features of the device as to respond to a vertical movement. About midway between the first and second plane a saddle was suspended for occupation by the operator, his feet and arms being free to function the control adjustments.

Stability is, of course, an essential element in flying. If equilibrium is to be maintained, as pointed out by the record, the firmness of the structure and its ability to maintain equilibrium, both in lateral and other angles of flight, are of paramount importance. As pointed out in the defendant's brief, "stability is the property which tends automatically to restore an airplane to its position of equilibrium without application of the controls." The art unquestionably teaches and has demonstrated long since that to avoid direct precipitation downward, known as "nose dives," and overcome any tendency to roll, tip, or pitch, either upwards, downwards, or sidewise, to restore a plane to equilibrium a form of construction must be made available, strong enough within itself to receive the pressure of the air either upon the top or bottom portions of its surface. From Montgomery's claims in this group the contention is advanced that his rear wing acts as a stabilizer and secures the desired results; that the adjustment of the rear portions of the rear wing so as to effect a change of curvature, in connection with the movable fin and small vertical plane intersecting the same, capable of vertical movement, is the equivalent of the Government's structure designed to secure stability and control. Accrediting expert testimony, especially where it harmonizes, two inescapable principles attach to stabilization: First, the stabilizing surface, as previously observed, must be of sufficient rigidity to withstand the pressure of air currents upon both its upper and lower portions. It as frequently happens in the restoration of equilibrium that air pressure

from above be obtained as from below; in each instance the necessity is due to the inclination of the airplane. Second, the angle of incidence becomes important. The stabilizing plane must be located at such a distance back from the center of gravity as to practically produce a zero angle of incidence relatively to the forward wing.

The stabilizing plane affords no support; it does not function as a "lift." While movable in some machines, in accord with certain required adjustments, it furnishes no sustentation; consequently, the development of the art clearly discloses that uniformly the stabilizing plane has been of much less dimensions than the supporting wings of the machine, and because of its location and mounting on the structure is incapable of performing the double function of aid in soaring and maintaining stability in flight. Montgomery's rear wing, as specified and claimed, is inherently so constructed as not to be adapted to receive pressure from above; it functions as a companion to the forward wing in obtaining support and equilibrium. The very structure of the wing with its rear portions capable of change in curvature negatives the possibility of continued rigidity. While the front portions of the wing are stationary, the claimed novelty of a change of curvature precludes the possibility of the same conditions upon the rear portions, as they are admittedly flexible. There is nothing in the specifications or claims of Montgomery that points out a utilization of or the possible functioning of his rear plane as a stabilizer. The specification recites "investigation has shown me that a wing is a specially formed surface placed in such a position as to develop a rotary movement in the surrounding air. This position is determined by mathematical considerations. The movements in the air are of such a nature as to make it possible to separate the wing-surface, as I have done in my device, into front and rear sections and maintain the special rotary movement of the air which lies at the basis of this phenomenon." The rear wing of the Montgomery patent was identical in contour and construction with the forward wing; its adjustment with relation to the control system, activated by the operator, clearly discloses, in our opinion, that the inventor did not contemplate or conceive the possibility of it

functioning as a stabilizer. In addition to this, the record is convincing that the contention advanced to sustain the proposition fails to sustain as a principle of aerodynamics that the patentee's rear wing is capable of functioning as claimed.

The stabilizing plane in the Government airplanes is located at and slightly extended over the rear end of the fuselage. It is stationary, less than 10% of the forward wing surface and set at a negative angle of incidence. The record is free from disputation that as so mounted and constructed it operates successfully as a stabilizing plane.

It is apparent that the stabilizer of the Government airplanes has a totally dissimilar function from that possessed by a supporting surface or aeroplane. It therefore becomes impossible to apply those claims of Montgomery (claims 12, 17, and 18), which call for "plural curved airplanes, one in advance of the other," to the Government structure by attempting to designate the stabilizer as the rear airplane without doing violence to the well-known doctrine of equivalents.

It is next insisted that Montgomery's horizontal tail surface in the rear of his second wing, with means for swinging said tail surface vertically is the equivalent of the Government's construction designed to afford directional control. Montgomery employed and his claims embrace the horizontal fin, intersected midway by the small vertical plane, the combination being so attached to the control adjustments as to function vertically upon the application of pressure by the operator. The Government planes utilize a small horizontal fin to the immediate rear of which is hinged a movable rudder functioning vertically. To the immediate rear of the Government's stabilizing plane two distinct continuations of the plane are separately hinged, capable of vertical movements, known as elevators. Within the space separating the two elevators the horizontal rudder is afforded freedom of movement horizontally. The principle of equivalents is predicated upon the similarity of the functions the two devices perform. As said in *Graham* v. *Mason*, 5 Fish. 11:

"Infringement depends not so much upon the form of the particular device in question, or upon the name given

to it in the specification by the construction, as upon the functions it performs, and it is well-settled law that if one device is employed in a similar combination as another, and performs the same function in the same way, the two are substantially the same, although they may be different in form and may be known among mechanics by different names."

Montgomery evidently followed in the wake of preceding inventors in his conception of the rear surfaces necessary to secure directional control. The fin surface to which the vertical plane was permanently attached moved in unison vertically, and while it may have functioned to have in some degree afforded the desired control, it was not, so far as this record is concerned, adapted either as to location or construction to afford the two essential movements, i. e., the horizontal and vertical movements obtained by the Government machines through the horizontal rudder and the separate vertical elevators. These surfaces, as practical demonstrations proved, did not function in the same way the Government's machines functioned. In addition to this, Prof. Langley's article in McClure's Magazine, published in 1897, both by description and illustration exhibited this form of structure and the principle was clearly disclosed in the Wright brothers' machine. True, the location in the Wrights' machine was directly the opposite of what it was in Montgomery's patent, but the functioning element of the device was precisely similar. Early inventors recognized the necessity for rear fin surfaces, a surface likened in the record to the feathered tip of an arrow, to secure directional control; it was not new.

The scope for invention was narrowed to a structure capable of utilizing air currents to obtain both lateral control and altitude. It would be difficult indeed to ascribe to Montgomery the first successful accomplishment of this purpose, in view of the prior art and the repeated decisions of the courts holding the Wright brothers to have been pioneer inventors in an art when this identical subject is of such vital importance. *Wright Co.* v. *Herring-Curtiss Co.*, 211 Fed. 654, 177 Fed. 257, 204 Fed. 597; *Wright Co.* v. *Herring-Curtiss Co.* (C. C. A.), 180 Fed. 110; *Wright Co.* v. *Paulhan*,

177 Fed. 261; *Wright Co.* v. *Paulhan* (C. C. A.), 180 Fed. 112. The Montgomery device does not, in our opinion, disclose the essential elements to obtain the desired end. It was not accorded by those skilled in the art the possibility of practical use, and demonstrations proved its inability to so function.

The third group of claims, i. e., 9, 12, and 32, is apparently limited to a specific type or character of supporting surfaces defined in the claim as "curved parabolically." Claim 9 is typical of this group. It is in the following language:

"An aeroplane curved parabolically from front to rear, its front portion being rigid and its rear portion adjustable, with means for adjusting said rear portion relatively to the front portion to change the surface of the aeroplane."

The plaintiffs insist that the claims involved are not so limited; that the specifications in conjunction with relative claims involving character of wing surfaces clearly entitled the inventor to a broader construction of the claims in this respect. We have heretofore noted the course of the patentee's application through the Patent Office and the effect of the examiner's ruling. A court called upon to construe a patentee's claims finds therein significant technical words definite in character and imparting a distinct description in the art to which the claim appertains; obviously they are to be given effect; they may not be eliminated. The patentee had in mind something more than a generalization when he employed limiting words. The contour of supporting wing surfaces, as clearly disclosed by the great volume of expert testimony, was a factor which inventors recognized as of weighty importance. The distinct curvature and structural feature of wing surfaces, both as to upper and lower surfaces of the wings, afforded not alone the full measure of air pressure upon the lower surface but functioned to obtain the vacuum lift upon the upper surface. Curved wings, as previously observed, were not new. They were distinctly old in the art. This record is replete with old devices disclosing curved wings. True, many of the illustrations are crude, but the functioning of curved wings had been demonstrated prior to the advent of Montgomery, so that the significance of a parabolically curved wing is apparent. It is

hardly possible that the Patent Office would have ascribed novelty to a curved wing surface. Montgomery was an experienced and educated inventor. He was not a mere adventurer in the art depending upon chance for a patent. In addition to his accomplishments as a scholar he possessed talents as a skilled mechanic, constructing his own devices, and his implicit faith in the soundness of his conceptions cost him his life. In view of this situation, with the whole of the English language at his command, we are prevented from concluding that he did not intend a specific limitation of wing surfaces when he used the words "parabolically curved." There was merit in a parabolically curved wing surface. Such a surface did function as the inventor contemplated it would, and while the question of the validity of Montgomery's claims in this respect is an exceedingly close one, a question we need not determine, we are of the opinion that the claims now under discussion were limited to this specific form of curvature.

It is an axiomatic principle of patent law too well sustained to warrant extensive citation that under the patent statutes the claims of the patentee define the patent, and when the language used is not obscure or ambiguous and has a settled meaning, courts are not at liberty to enlarge the same by construing them to intend something different. The Supreme Court in the case of *White* v. *Dunbar*, 119 U. S. 47, decided a similar contention to the one in this case. We think the decision apropos. The wing surfaces of the Government airplanes were not "parabolically curved." The dissimilarity is apparent.

We can not discuss in infinite detail the great number of technical and general issues raised by both sides in this case. We do not minimize the importance of the various contentions. Suffice it to say that in the opinion of the court the Montgomery patent, irrespective of its validity, was one limited to its peculiar structural features, a designed combination of elements old in the art, utilized by the inventor to function in a certain novel way. The degree of novelty and invention to be ascribed to such a patent is limited to the specific device produced. The burden of estab-

lishing the use of equivalents or the device itself is upon the inventor who alleges infringement, and granting to the plaintiffs the widest latitude in this respect we are unable to find from the record wherein the Government machines have trespassed upon the patentee's devices or adapted equivalents in the structures it used. Subsequent to the Wright patent the art developed rapidly. The machines used by the Government functioned with a degree of success decidedly and emphatically impossible of attainment by the employment of any of the elements of Montgomery's patent utilized as he utilized them. Whatever features of similarity in construction might be claimed between the Government and the Montgomery machines may only be found in a most technical evolution of obscure detail of construction and claims, which upon investigation disappear when tested by the prior art and faced with actual differences. The Montgomery and Government structures present such a distinct divergence of structural detail and functioning capacity that it is impossible to read the claims of the Montgomery patent upon the Government machines.

The petition will be dismissed. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

DUNBAR & SULLIVAN DREDGING CO. v. THE UNITED STATES

[No. E-290. Decided May 28, 1928]

On the Proofs

Contract for dredging; preliminary examination of work; misrepresentation as to material to be dredged.—An advertisement for bids, made part of a contract for dredging, provided that "the material to be removed is believed to be sand, clay, gravel, and boulders, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description." The cost of a complete and thorough examination of the work between advertisement and bidding was prohibitive and the successful bidder, believing the description given in the advertisement to

be accurate, relied upon it and bid accordingly, but before entering into the contract inquired of the Government's representative as to the nature of the material to be dredged and was given no information beyond that contained in the advertisement, although the said representative knew that hardpan would be encountered, necessitating difficult and costly excavation. *Held*, that the contractor was entitled to recover the additional cost of excavating the hardpan.

Same; request for modification of contract; certification of vouchers under coercion.—During the course of the work above described the contractor requested additional compensation or relief from the contract, which requests were refused, and was also refused payment of the stipulated price unless certificates were furnished from time to time, limiting the description of the material dredged to "stiff clay" and "hard clay." The contractor signed the required certificates and received the bid price. *Held*, that the Government could not benefit by reason of such coercion.

Same; delay occasioned by Government's misrepresentation.—In the above circumstances the contractor *held* not liable for the additional cost of delay in completing the work due to the difference in material as represented and as actually excavated.

The Reporter's statement of the case:

Mr. John Lord O'Brian for the plaintiff. *Mr. Ralph Ulsh* and *Slee, O'Brian, Hellings & Ulsh* were on the briefs.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, Dunbar & Sullivan Dredging Company, is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under the laws of the State of New York, with its principal office at Buffalo, New York, and an operating office in the city of Detroit, Michigan, and was engaged in the business of marine dredging contractors.

II. Under date of March 20, 1920, the United States Engineer office at Buffalo, New York, advertised that it would receive proposals for the performance of certain dredging in the channel of the Niagara River, and at and near Tonawanda and North Tonawanda, to be performed in accordance with specifications forming a part of said advertisement.

Paragraph 27 of the detailed specifications, which were made a part of said advertisements, was as follows:

"*Character of materials.*—The material to be removed is believed to be sand, clay, gravel, and boulders, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description."

By the terms of said advertisement, all bids for the work were required to be in the hands of the district engineer, in his office at Buffalo, within thirty days from the date of said advertisement, or by April 20, 1920.

A copy of said advertisement for bids is filed with plaintiff's petition, marked "Exhibit A," and is made a part hereof by reference.

III. In response to the advertisement plaintiff, under date of April 20, 1920, submitted a written bid, by the terms of which it proposed to furnish all the necessary plant and labor and do all the work as specified at the following prices:

Dredging sand, clay, gravel, boulders, etc., at fifty cents per cubic yard, place measure.

Overcasting dredged material, at thirty cents per cubic yard, bank measure, in place after overcasting.

Said written bid, among other things, contained the following provisions:

"We (or I) make this proposal with a full knowledge of the kind, quantity, and quality of the articles, materials, and work required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the specifications, with good and sufficient sureties for the faithful performance thereof.

"DUNBAR & SULLIVAN DREDGING CO.,
"(Signature) By O. E. DUNBAR, *Treasurer*.
"By F. C. SLEE, *Secretary*.

"Address: 2212 Dime Bank Bldg.
"(Seal.)"

A copy of said bid or proposal is filed with plaintiff's petition as "Exhibit B," and is made a part hereof by reference.

IV. Plaintiff's bid for the work was the lowest and best bid, and was accepted by the United States, and pursuant thereto plaintiff and the United States entered into a written

contract under date of May 13, 1920, by the terms of which plaintiff obligated itself to furnish all the necessary plant and labor, and to do all the work as specified at and for the consideration named therein, the same being the amount of the bid submitted by plaintiff. Clarke S. Smith, lieut. colonel, Corps of Engineers, United States Army, represented the United States, and executed said contract for and on behalf of the United States.

A copy of said contract is filed with plaintiff's petition as "Exhibit C," and is made a part hereof by reference.

V. At the time proposals were advertised for plaintiff had no equipment at or in the vicinity of the site of the work with which to make an examination of the bottom of the Niagara River to ascertain the nature of the materials required to be dredged, and during the interval of thirty days allowed for submitting proposals the plaintiff could not bring to the site of the said work any of its equipment necessary for making such an examination because of the presence of ice in Lake Erie. During the period from March 20, 1920, to April 20, 1920, ice from Lake Erie was flowing down the Niagara River at intervals. It would have been possible to have made an examination which would have disclosed the character of the materials to be dredged, but the cost of a complete and thorough examination at that time of the year would have prohibited the making thereof by any prospective bidder.

Prior to submitting proposals to do the work and executing the contract plaintiff had no knowledge or information that the materials to be encountered in the performance of said work were of any other character than as described in the specifications. Plaintiff relied upon the description of the materials contained in the specifications and believed that the description contained therein correctly described the nature of the materials to be excavated, and did not acquire any knowledge to the contrary until the work had proceeded to a considerable extent.

VI. At and before the time the advertisement for bids for the proposed work was published the Government engineers who prepared the notice and advertisement calling for bids for the performance of the work, knew from reports of ex-

cavations previously made for the Government that at places in the area proposed to be dredged material would be encountered of the kind commonly designated by engineers and dredging contractors as hardpan; and that its excavation, in the language of the reports, would be "difficult and costly."

Before entering into the contract plaintiff's officers made inquiry of the representative of the Government in the United States Engineer office at Buffalo, who had practical charge of the work, in regard to the nature of the materials in the Niagara River under the contract area, but they were not given any information other than that contained in the contract, although the representative of the Government knew at the time that the reports of previous excavations showed that hardpan would be encountered in the dredging operations contemplated by the contract.

VII. Plaintiff commenced the performance of the contract on or about June 23, 1920, and continued therewith so long as weather conditions permitted until on or about January 15, 1921. The performance of the contract was resumed on or about May 16, 1921, and the contract was duly performed and completed by the plaintiff on or about December 21, 1921.

VIII. In the performance of said contract the plaintiff excavated 483,431 cubic yards of material, for which it has been paid the full contract price, less the sum of $912.78, which sum was deducted by the United States. The reasons for said deduction more fully appear in Finding XVI hereof.

IX. The work to be performed as covered by the specifications was the dredging in the main channel of the Niagara River of a channel 400 feet in width, extending down the Niagara River northerly from a point opposite the city of Tonawanda to a point opposite the city of North Tonawanda, being a distance of approximately 6,300 feet, and at the northerly end of the said channel the excavation of a turning basin approximately 1,200 feet in length by 1,050 feet in width, extending outwardly from the shore line.

X. In the performance of the contract plaintiff encountered and excavated in large quantities, at three separate portions of the contract area, a very hard material consisting of sand, clay, gravel, and boulders cemented together. This hard material was compacted and impervious to water

so that it broke into irregular masses when excavated. The hard material so encountered and excavated by the plaintiff is classified by dredging contractors and engineers as hardpan.

XI. An irregular mass of material designated as hardpan was encountered and excavated running northerly commencing at or about station 10. The amount of hardpan excavated in the irregular area near station 10 was 7,443 cubic yards. Another irregular mass of hard material was encountered and excavated extending north and south from station 30. The number of cubic yards of hard material or hardpan excavated in the irregular area near station 30 was 20,550.

The major part of the area of the turning basin, being the rectangular area 1,230 feet long and 1,050 feet wide at the northerly end, consisted of this hard material, which extended across the entire width of said turning basin from the shore line outwardly. The number of cubic yards of said hard material excavated by the plaintiff in the turning basin was 158,768.

Altogether plaintiff excavated 186,761 cubic yards of hard material, the same being generally denominated and classified as hardpan in the contracting business and by engineers.

Hardpan is the most difficult material to excavate except rock.

XII. The reasonable price or value of dredging the 186,761 cubic yards of hard material found in the contract area and excavated by plaintiff at the time of the performance of the contract was $1 per cubic yard.

If the classification "hardpan" had been inserted in the specifications, the Government engineers who advertised for proposals would have expected the proposals for said dredging to run from $1 per cubic yard and upward.

XIII. The description, sand, clay, gravel, and boulders, is commonly understood by dredging contractors and engineers as designating sand, clay, gravel, and boulders separately, in a natural shape, not cemented together, or hardened to the extent that the material is impervious to water.

XIV. Three lines of water pipe for three separate towns in the vicinity of the Niagara River had crossed the river

channel at a depth below the excavation required by the contract and the Government engineers were informed that in making the ditches required for these lines of water pipe the pipe-line excavations disclosed no hardpan. These ditches were not completed until after the contract in suit had been executed; and while the engineers of the Government were informed that no hardpan had been struck, the information was not entirely correct as some hardpan was encountered.

XV. Complaint was made by plaintiff, commencing in the fall of 1920 and continuing during the progress of the work, that the materials being excavated were not within the description contained in the specifications and the contract, and the plaintiff asked to be relieved from the contract or afforded other relief. After these complaints were made the Government engineers in charge of the work, commencing with the monthly estimate for the month of January, 1921, included in the certificates, estimates, and vouchers certifying to the performance of the work the descriptive terms "stiff clay" and "hard clay," and continued to include such designation in the certificates until the conclusion of the work.

These vouchers specified the number of yards and the unit price as provided in the contract and were signed by the treasurer or some official of the plaintiff corporation. Immediately above the signature appeared the following language:

"I certify that the above account is correct and that payment therefor has not been received."

The representative of the Government informed the representatives of the plaintiff that unless the certificate was signed agreeing that the material dredged was as described therein, the money would not be paid and their only recourse was to go to court. After being so informed plaintiff's representative signed the statement.

XVI. Owing to the difficulty in excavating the hard material or hardpan encountered in the performance of the contract, plaintiff was not able to make the progress or complete the work within the time provided in the contract for

the completion thereof. If in making the excavations in the contract area plaintiff had encountered sand, clay, gravel, and boulders separately, in a natural state, not mixed together or compacted or hardened, it would have completed the contract within the time specified in the contract as the date of completion thereof, which was November 9, 1921.

In making final settlement with plaintiff at the contract price, the Government deducted the sum of $912.78 from moneys due the contractor, said amount being the compensation of inspectors in the employ of the United States who inspected the performance of the work during all of the time subsequent to November 9, 1921, until the work was completed.

XVII. The plant employed by plaintiff on the work consisted of a powerful dredge, two scows, a tug, and a coal lighter. Plaintiff had at all times adequate facilities on hand for the performance of the contract.

The court decided that plaintiff was entitled to recover $93,793.28.

GREEN, *Judge*, delivered the opinion of the court:

On May 13, 1920, the plaintiff entered into a written contract with the defendant to perform certain dredging in the Niagara River and commenced the performance of the contract about June 23, 1920, and completed it about December 21, 1921. For this work the plaintiff was paid the contract price for the work done, less $912.78 deducted by the defendant by reason of the failure of the plaintiff to complete the work within the time provided by the contract.

Plaintiff brings this suit alleging in substance in its petition that after the work was commenced plaintiff discovered that a large part of the material to be dredged was wholly different in character from the material described in the specifications of the contract and was of the nature usually designated as "hardpan," that is, a hard compact clay in which was embedded stones and small boulders, whereas the contract described the material to be removed as sand, clay, gravel, and boulders; that as the work progressed this hard material was encountered in increasing quantities and at the northerly end of the contract area termed the "turn-

ing basin " where the greatest amount of material was to be dredged, the hardpan predominated; and that of the materials dredged under said contract 185,761 cubic yards were hardpan and only 301,312 cubic yards were sand, clay, gravel, and boulders as described in the specifications of the contract.

The plaintiff further alleges that at the time of the advertisement for bids and in the execution of the contract, the defendant knew that hardpan existed in large quantities throughout the area covered by the contract and that it would be costly to dredge, but that the plaintiff was without knowledge of such facts, and relied on the statements contained in the specifications of the contract.

The petition further recites that by reason of the misdescription of the material to be excavated under the contract, the cost of performing the work greatly exceeded the amount received from the defendant and it asks judgment for the reasonable value of dredging the hardpan encountered in the performance of the contract over and above the contract price, and also for the amount withheld from the contract price by the defendant.

While there is some controversy in the evidence with reference to the facts above set forth and which are alleged in the plaintiff's petition, we think they are established by a clear preponderance of the evidence. The evidence establishes that much of the material encountered in the performance of the contract consisted of sand, clay, and boulders cemented together in a hard material that was compacted and impervious to water so that it broke into irregular masses when excavated. The evidence abundantly shows that such material is classified by dredging contractors and engineers as " hardpan," and that it was in fact hardpan. There is no question but that the Government engineers who prepared the advertisement for bids and the contract knew from reports of excavations previously made for the Government within the area proposed to be dredged that material would be encountered of the kind commonly designated by engineers and dredging contractors as hardpan, and that its excavation in the language of the reports, would be " difficult and costly." Before making the bid for the con-

tract, plaintiff made inquiry of the Government agents with reference to the material to be dredged and it received no information beyond that contained in the contract.

It is urged on behalf of the defendant that the plaintiff's bid on the contract required it to make an independent examination of the site and ascertain for itself the nature of the work before entering into the contract. In *Hollerbach* v. *United States*, 233 U. S. 165, a similar claim was made on behalf of the defendant but the court said, "We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt." The evidence shows clearly that neither contractors nor engineers would consider the specifications of the contract with reference to the material to be excavated as including hardpan. We think the language of the *Hollerbach case* is applicable. Plaintiff had no knowledge of the existence of hardpan in the material to be dredged. True, it could have obtained access to the Government reports on the former excavations, but under the doctrine of the *Hollerbach case* it was entitled to rely upon the specifications of the contract and was not bound either to look up the Government reports or to make investigations in the channel of the river through borings or otherwise to ascertain the nature of the material to be dredged. In this connection it should be observed that the evidence shows that at the time of year when the contract was entered into it was impractical to make a thorough investigation on account of ice and other difficulties. See also *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, and *United States* v. *Spearin*, 248 U. S. 132, in both of which cases it is held in substance that a direction to contractors to visit the site and inform themselves of the actual conditions of a proposed undertaking will not relieve from defects in the plans and specifications, and "that the contractor should be relieved,

Opinion of the Court

if he was misled by erroneous statements in the specifications." The evidence shows plainly that the contractor was misled by the specifications.

It is also urged on behalf of the defendant that the plaintiff ought not to recover because the officer of plaintiff corporation executed from month to month certificates in which the material dredged was variously described as sand, clay, gravel, boulders, and hard or stiff clay, and it is said that no written protest was made against the decision of the contracting officer nor were any of the other requirements of the contract complied with, which were required in case the contractor believed it was performing extra work not called for by the provisions therein.

The evidence shows that Davis, the Government engineer, told the plaintiff's agents that if they did not agree that the material dredged was as described in these certificates no money would be paid, and the only recourse was to go to court. In fact, the representative of the Government stated that there would be no payment, even on a basis of the contract price, unless these certificates were signed as prepared by him. The plaintiff's representative made requests for additional compensation or to be relieved from the contract, but these requests were refused. It was obviously useless for the plaintiff to go any further. In the case of the *United States* v. *Smith*, 256 U. S. 11, a similar claim was made that modifications of the contract should be in writing, but the court said: "The contention overlooks the view of the contract entertained by Colonel Lydecker and the uselessness of soliciting or expecting any change by him," Lydecker being the representative of the Government in charge. The opinion also says that the contention is "against the explicit declaration of the contract of the material to be excavated." In the case at bar it is quite obvious that it would have been useless to go further with Davis. What he said to plaintiff's representative made it clear that no modification would be made, and we think the failure to obtain such a modification should not prevent the plaintiff from recovering herein; so also the fact that plaintiff's representative signed the certificates of work done without any mention of hardpan being

contained therein is not sufficient cause for denying plaintiff's claim. Plaintiff's agent protested against the form of these certificates and only signed them because of the positive statement of Davis that plaintiff would otherwise receive nothing unless it got it through the courts. Plaintiff was clearly entitled to a certificate showing the kind of material actually excavated and the defendant ought not to benefit by reason of having coerced plaintiff into signing a certificate that did not express the real facts.

The defendant relies on the cases of *Sanford & Brooks Co.* v. *United States*, 58 C. Cls. 158, 267 U. S. 455, and *Midland Land & Improvement Co.* v. *United States*, 58 C. Cls. 671, 270 U. S. 251, but in neither of these cases did the plaintiff rely upon the specifications contained in the contract and in both of them it was expressly held that the plaintiff was not misled by the specifications. In the case at bar the evidence shows that the plaintiff did rely on the specifications and that it was misled thereby. In the face of the record of the previous dredging which had been done for the Government in the same channel, the statements contained in the contract as to the material to be dredged were either known to be false by the Government agents preparing them, or at least constituted such a gross and inexcusable error as to entitle the plaintiff to relief.

In making payment to the plaintiff the defendant deducted $912.78 on account of the failure of plaintiff to complete the dredging within the time specified in the contract. The evidence shows that this failure was caused by the plaintiff encountering in its dredging, material which it had no reason to expect under the contract, and the deduction is without justification. The plaintiff is therefore entitled to recover for the additional cost made necessary in dredging material not provided for by the contract, together with the amount deducted on account of its failure to complete the contract within the time specified therein, and judgment will be entered in its favor accordingly, not to exceed, however, the amount claimed in the petition.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

LAMPORT MANUFACTURING SUPPLY CO. v. THE UNITED STATES

[No. C-1209. Decided May 28, 1928]

On the Proofs

Sale of surplus property; shortage in delivery; recovery of purchase price.—Where the purchaser pays the full amount of its bid, and the vendor delivers a portion of the goods sold but is unable to deliver the balance, the purchaser is entitled to be reimbursed the purchase price on the shortage.

Same; counterclaims; rescission of sale and retention of liquidated damages; remedy for breach.—By rescinding a sale the vendor elects to keep the goods as his own and his remedy, if any, is to sue for the difference between the market price at the time and place of delivery and the contract price. Where the bidder pays as liquidated damages for possible breach an agreed sum, and the vendor upon failure to take the goods rescinds the contract and retains the said sum, the vendor can not recover a loss sustained through resale.

Same; authority of public officer; assumption of validity.—The courts will assume that an officer, in the performance of an official act, not only took all necessary preliminary steps but acted within the circumference of his authority. There is a presumption in favor of the legality of his official act which must be overcome by satisfactory proof that the officer exceeded his powers.

The Reporter's statement of the case:

Mr. William D. Harris for the plaintiff. *Messrs. Frank Davis, jr.*, and *Robert T. Scott*, and *Palmer, Davis & Scott* were on the brief.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is and was during the period hereinafter mentioned a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business in the city of New York; and is and has been engaged in the business of buying, selling, and convert-

ing cotton goods and other goods and merchandise for export and domestic trades.

II. On the 10th day of March, 1920, it purchased from the War Department of the United States, office of the Quartermaster General, Director of Purchase and Storage Surplus Property Division, Washington, D. C., 436,520 pounds of candles at the price of 9¢ per pound, making the total price $39,286.80. Said purchase was evidenced by a written letter of acceptance of bid for surplus property, dated March 10, 1920, signed by Walter C. Plunkett, first lieutenant, Quartermaster Corps, contracting officer, surplus property division, office of the Quartermaster General, Director of Purchase and Storage, and constitutes the contract under which said candles were sold by the United States and purchased by plaintiff. A true copy of said contract is attached to the petition as Exhibit A and made a part hereof by reference.

III. Pursuant to the terms of said contract, plaintiff paid to the zone supply officer at New York, New York, the full amount of the purchase price of said candles, namely, $39,286.80.

IV. Thereafter, upon the request of plaintiff, 100,080 pounds of candles were delivered to it, leaving a balance due and which had been paid for of 336,440 pounds.

V. The said surplus property division of the War Department failed to deliver the balance of said candles, namely, 336,440 pounds, and on April 18, 1921, plaintiff was advised by S. J. D. Marshall, captain, Quartermaster Corps, chief of the sales branch of the quartermaster supply office, New York general intermediate depot, that the undelivered balance of 336,440 pounds of candles had been canceled and that he had been directed to issue credit to plaintiff for $30,279.60, due over and above the shipments made.

VI. Since said date, namely, April 18, 1921, plaintiff has repeatedly demanded payment to it of the said sum of $30,279.60 so due to it from the United States, represented by the surplus property division of the War Department, but the United States has failed and refused and neglected to pay the same and still so neglects and refuses.

VII. No other action has been had on said claim in Congress or by any of the departments; no person other than plaintiff is the owner of said claim or interested therein; no assignment or transfer of said claim, or any part thereof or interest therein has been made; plaintiff has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

First counterclaim

VIII. The surplus property division of the Quartermaster Corps, War Department, prior to the bidding date of July 19, 1920, advertised for sale certain surplus war supplies. Among other items offered for consideration to prospective bidders were the following:

Item No. T–2858. 87,473 YARDS OSNABURG, BROWN—
26 inches, 7 ounces, 44x28. Made by Bancroft & Co. Stored at Philadelphia. Minimum bid considered, 1,200 yards. SPD 17,979.

Item No. T–2859. 208,958 YARDS OSNABURG, BROWN—
27 inches, 7 ounces, 44x26. Made by Bancroft & Co. Stored at Philadelphia. Minimum bid considered, 1,000 yards. SPD 17,972.

The advertisement set out the following terms of sale:

"*Inspection.*—Goods are sold f. o. b. storage point. Samples of practically all articles are displayed at depot offices and at the Surplus Property Division, Munitions Building, Washington, D. C.

"*Negotiations.*—No special form is required for the submission of a bid. Bids may be made by letter or telegram.

"A 10 per cent deposit must accompany all bids. Such bidders as may desire to do a continuous business with the surplus property division, a term guaranty in the sum of not less than $25,000 may be deposited with the surplus property division at Washington, D. C., or with the depot officers; such term guaranty is to be so worded as to bind the bidder to full compliance with the conditions of any sale with regard to which he may submit proposals—that is, proposals on any property offered for sale by the surplus property division during the lifetime of the guaranty. A term guaranty will not relieve the bidder from the for-

warding of his certified check for 10 per cent of the amount of his purchase within 10 days from notification of award.

"*Delivery.*—The articles offered are for spot delivery. Purchasers will be permitted to leave stocks which they may acquire in Government storage for a period of 30 days after receipt of notification. Goods so held will be held subject to purchaser's risk."

IX. In response to said advertisement the plaintiff submitted two bids for item No. T–2858, one for 25,000 yards at $.1755, and the other for 25,000 yards at $.1705. It also submitted two bids for item No. T–2859, one for 50,000 yards at $.1755 and the other for 50,000 yards at $.1705.

X. Under date of August 18, 1920, the defendant accepted all four of these bids. The letters of acceptance contained the following clauses, among others:

"*Deposit.*—Deposit of 10 per cent of the amount of this purchase must be delivered to the designated depot officer before this letter of acceptance is effective or valid, and this amount is deposited by the purchaser with the understanding that the same is given as a guarantee of fulfillment of agreement to accept these goods within the time, at the place, and in the manner herein specified; and upon fulfillment of the contract said amount to apply, if so desired by the purchaser, as part payment for the last quantity ordered delivered or will be returned after fulfillment of contract.

"*Time for payment.*—Full payment for all goods awarded by this letter must be made before delivery and within 30 days from date of this letter unless otherwise specifically stipulated."

These bids and acceptances involve a total yardage of 150,000, at a combined cost of $25,950.00.

On the date of said acceptances the plaintiff paid to the defendant $2,595.00, being 10% of the amount of the bid.

Likewise, on August 18, 1920, the plaintiff sent its certified check for $1,705.00 in the payment of 10,000 yards of item No. T–2858, and on September 3, 1920, acknowledged receipt of bill of lading evidencing shipment in that amount.

XI. The plaintiff failed and neglected to make payment of the balance of said agreed price on the four lots of osnaburg. During the months of October, November, and December of 1920, and January, 1921, the defendant made fre-

quent demand for the payment of this balance and the acceptance of the remainder of the yardage.

The defendant rescinded the said four sales, and under date of March 25, 1921, so notified the plaintiff, stating that a forfeiture had been directed "of all moneys paid by you on these sales over and above value of shipments taken out to be applied against loss, if any, on resale." The 10% deposit was thereafter held and retained by the defendant.

XII. On April 22, 1921, the defendant informed the plaintiff that it was offering for sale for the plaintiff's account the osnaburg which the plaintiff had failed to make payments for, and that such sale was by sealed bid closing May 3, 1921. It enclosed in said letter the offer list, calling attention to items 46 and 50 thereof. These items were as follows:

Article	Unit	Quantity (more or less)
46. OSNABURG, brown, 26½" to 27" 6.20 oz. 44 x 26. Packed 650 yards to roll. Location, Philadelphia, Pa. SPD No. 17972.	Yd......	154, 990½
50. OSNABURG, brown, 26", 6.62 oz. 44 x 28. Packed 750 yards to case. Location, Philadelphia, Pa. SPD No. 17979.	Yd......	53, 343

Among the conditions of this sale appeared the following:

"*Sealed proposals* for not less than 500 yards, or any multiple thereof, or for the entire lot of any of the surplus Government materials listed below, will be received in this office until 1 p. m., May 3, 1921, at which time and place they will be opened in the presence of attending bidders.

"*Deposits.*—When the total amount of a bid is $250.00 or less, payment in full, in cash, certified check, or money order must be made at the time of submitting the bid. Bids of over $250.00 must be accompanied by 10% of the amount of the bid in cash, certified check, or money order.

"*Payments.*—In the acceptance of bids of $250 or less the deposit mentioned above will apply as payment. On accepted bids of over $250.00 the deposit mentioned above will apply as a part payment and the balance (90%) must be paid in cash, certified check, money order, or bankers' letter of credit. Letters of credit must be such that a draft may be drawn against the same for the full amount thereof at 30, 60, or 90 days from the date of executing the sale. The quartermaster supply officer will determine the time of credit allowed.

"*Delivery* must be taken within 30 days from the date of executing the sale, or the Government reserves the right to remove material from Government storage and place same in a public-owned warehouse at the expense and risk of the purchaser. No goods will be delivered until the entire amount of the sale has been paid. If it is not feasible or possible to make delivery from advertised point of storage, the Government reserves the right to make delivery f. o. b. cars at any other point of storage within the territorial limits of the United States, making freight differential between advertised point and point of actual delivery.

"*Inspection* of these materials at point of storage is invited. No bid will be accepted subject to inspection, nor will any claim be considered subsequent to sale if the goods do not come up to the expectations of the purchaser. On the purchase of all dyed ducks the Government reserves the right to deliver material with a variation of one ounce per linear yard in weight and one inch in width, this owing to the fact that duck is likely to be listed according to construction in the gray. The above variation is allowed for stretch in length and resultant contraction in width during the process of dyeing.

"*Claims* must be filed with the eastern surplus property control officer within 30 days from the receipt of the goods by the purchaser. No claims will be entertained on goods sold 'as is' and 'where is' except on shortage in delivery."

XIII. Fifteen thousand (15,000) yards of osnaburg, item No. 50, were sold for $895.35, 10,000 yards for $558.00, 109,990½ yards of osnaburg, item No. 46, for $5,576.52, and 23,348 yards of osnaburg, item No. 50, for $1,315.06, or a total of 158,338½ yards, for $8,344.93, as a result of this sale. Acceptances of these bids were made on May 13, 16, 21, and 21, 1921, respectively.

XIV. Osnaburg weighing 7 ounces is a different cloth than osnaburg weighing 6.62 ounces. The latter is of four or five per cent less value than the former.

27-inch osnaburg weighing 7 ounces is a different cloth than 26½ to 27 inch osnaburg weighing 6.20 ounces. The latter is of 12½ to 15 per cent less value than the former.

Other things being equal, the more stringent terms of the latter sale would tend to reduce materially the number of bidders and the amount of their bids.

Second counterclaim

XV. Likewise the surplus property division of the Quartermaster Corps of the War Department prior to the bidding date of March 15, 1920, advertised for sale further surplus war supplies. Among other items offered for consideration to prospective bidders was the following:

Item No. T–1910. 195,081 YARDS DUCK, RAW SELVAGE, GRAY—

37½″, No. 9, 36 x 30. Manufactured by the Passaic Cotton Mills. Stored at Schenectady, N. Y. Minimum bid considered 500 yards. SPD No. 14480.

The advertisement set out the following terms of sale:

"*Inspection.*—Goods are sold 'as is' at storage point. Samples of practically all articles are displayed at zone supply offices and at the Surplus Property Division, Munitions Building, Washington, D. C.

"*Delivery.*—The articles offered are for spot delivery. Purchasers will be permitted to leave stocks which they may acquire in Government storage for a period of 30 days after receipt of notification. Goods so held will be subject to purchasers' risk."

Plaintiff's representative examined samples of the duck advertised for sale, which it subsequently bought, and found it to have a blue line.

XVI. In response to said advertisement the plaintiff submitted its bid for the entire amount, to wit, 195,081 yards at an average price of $0.42875, or a total of $83,631.76. Under date of March 30, 1920, the defendant accepted plaintiff's bid, letter of acceptance containing the same clauses, among others, as are set forth in Finding X above.

On that date the plaintiff paid to the defendant the sum of $8,363.18, being 10% of the amount of the bid. On May 18, 1920, the plaintiff sent a certified check for $10,887.50, being a payment for 25,000 yards of said duck at $0.4355 per yard. On August 9, 1920, the plaintiff sent a certified check to the defendant for $4,405 in payment of 10,000 yards of said duck. In September 20, 1920, it likewise sent a certified check for $22,596.50 in payment of 53,000 yards, 50,000 at $0.4255 and 3,000 at $0.4405. On September 24,

1920, it sent a certified check for $10,762.50 in payment of 25,000 yards of said duck, and on September 30, 1920, it sent its check for $2,202.50 in payment of 5,000 yards of said duck. The total was 118,000 yards at a combined price of $50,854.00. Shipments to the amount of 117,967½ yards were made by the defendant on these orders.

XVII. Plaintiff failed and neglected to make payment for the balance of said agreed price. On December 30, 1920, the defendant made demand on the plaintiff for payment of the balance and acceptance of the remainder of the yardage. This demand was repeated January 28, 1921, and on March 5, 1921, the plaintiff was advised that unless payment was made the sale would be canceled and the deposit "retained to apply toward loss to the Government on resale of these supplies." This warning was repeated March 9 and March 14.

Under date of April 5, 1921, defendant rescinded the said sale, declared the deposit forfeited, and so notified the plaintiff May 6, 1921. The deposit was thereafter held and retained by the defendant.

XVIII. Under date of April 22, 1921, the plaintiff received a notification from the defendant that it was offering for sale the duck which was the subject of plaintiff's contract in an amount of 117,967½ yards, and that sealed bids would be closed May 3, 1921. Plaintiff was further informed that "any loss sustained in the resale will be charged to you." The goods listed for sale were described in official textile list #5 in the following manner:

Article	Unit	Quantity
77. DUCK, gray, no blue line, raw selvage, 37½", #9, 17.20 oz. 36 x 30. Packed 150 yards to roll. Location, Schenectady, N. Y. SPD No. 14480.	Yd......	195,081

On or about May 23, 1921, defendant sold 19,000 yards of the cloth described in item 77 above for the sum of $3,815.60.

Without further special notice to the plaintiff the defendant, under date of June 7, 1921, issued its textile sealed proposal #7, in which it listed the following for sale, the bidding date to be July 5, 1921:

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Article	Unit	Quantity
15. DUCK, gray, no blue line. Raw selvage. 37½", #9, 17.20 oz. 36 x 30. Packed 150 yards to roll. Location, Schenectady, N. Y. SPD No. 14480.	Yd.....	58,963

As a result of bidding thereon the duck described as item No. 15 above was sold as of July 19–23, 1921, in the following quantities and amounts:

1,000 yards at .1701	$170.10
1,000 yards at .1651	165.10
5,000 yards at .18	900.00
5,000 yards at .17	850.00
45,975 yards at .1641	7,544.50
57,975	9,629.70

The terms of these sales of duck were the same as those set forth in Findings X and XII above.

XIX. "Blue Line" is a colored thread, woven in the warp, about ¾ of an inch along the selvage of the duck. It is used generally as a guide, and because of this fact its presence renders the duck more valuable. The phrase "duck, raw selvage, gray," would indicate a duck that was woven on a wide loom, split in the middle, leaving the fiber sticking out, and having a blue line woven therein. The statement that it was manufactured in the Passaic Cotton Mills would further indicate the presence of a blue line, as this was considered to be a high-class duck mill. If duck were described as "no blue line," it would indicate that the same was made in some mill other than a recognized high-class duck mill and that the duck was not a first-class piece. There is usually a difference of between 15 and 40 per cent in the value of duck having blue line and that having no blue line.

Third counterclaim

XX. Prior to the bidding date of April 19, 1920, the surplus property division, Quartermaster Corps, War Department, advertised for sale certain surplus war materials, among which items offered for consideration was the following:

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Item No. T-2319. 90,827 YARDS DUCK GRAY—
23 inches, #4, 32x20. Manufacturer unknown. Stored at Schenectady, N. Y. Minimum bid considered, 500 yards. SPD No. 15352.

The advertisement set out the same terms of sale as in the previous original sale of the duck, as set forth in Finding XV above. In response to said advertisement the plaintiff made the following bids:

10,000 yards at	$0.3015
10,000 yards at	.2985
10,000 yards at	.2915
10,000 yards at	.2885
10,000 yards at	.2815
10,000 yards at	.2785
10,000 yards at	.2715
10,000 yards at	.2685
10,827 yards at	.2615

Plaintiff's representative examined samples of the duck advertised for sale, which it subsequently bought, and found that said samples had a blue line.

XXI. Under date of May 17, 1920, the defendant sent its letter of acceptance to the plaintiff, in which it accepted plaintiff's bid in an amount of 60,000 yards, at a total price of $22,800.00. Plaintiff forwarded its check in the sum of $2,280, being 10% of the amount of said bill. Said acceptance contained the same terms of sale as heretofore set forth in previous acceptances.

XXII. On June 29 plaintiff sent a certified check for $380.00 in payment of 10,000 yards of said duck; on July 15, $1,140.00 in payment of 3,000 yards; July 28, $380.00 in payment of 1,000 yards; August 5, 1920, $760.00 in payment of 2,000 yards; on August 12, $2,280 in payment of 6,000 yards; on August 13, $1,140 in payment of 3,000 yards; on August 19, $76.00 for 200 yards; and on October 13, $1,900.00 for 5,000 yards, making a total in all of 30,200 yards at a combined price of $8,056.00.

Shipments to the amount of 21,124 yards were made by the defendant on these orders.

XXIII. Plaintiff failed to make payment of the balance of said bids as accepted. Under date of December 30, 1920, the defendant called attention to the plaintiff's failure to consummate said sale and on January 25, 1921, demanded

the balance due under said agreement. The request was repeated January 28, 1921, and on March 5, 1921, the plaintiff was informed unless payment was made same would be canceled and deposit "retained to apply toward loss to the Government on resale of these supplies." On March 9 plaintiff was given until March 31, 1921, to complete payment, and was notified that on failure thereof the sale would be canceled. This warning was repeated on March 14, 1921, and on April 22, 1921, the plaintiff was informed that the remainder of said duck (as the letter set forth), "21,124 yards," would be offered for sale for its account under sealed bid closing May 3, 1921, and any loss sustained on resale would be charged to it.

Under date of April 5, 1921, defendant rescinded the said sale, declared the deposit forfeited, and so notified the plaintiff May 6, 1921. Thereafter the defendant held and retained the said deposit.

XXIV. The goods listed for sale were described in the official textile list #5 as follows:

Article	Unit	Quantity
76. DUCK, gray, no blue line, 23", #4, 32 x 20. Packed 120 yards to roll. Location, Schenectady, N. Y. SPD No. 15352.	Yd......	60,000

Sales made of said duck were under the same terms as set forth in Finding XII and were in the following amount:

1,200 yards, at .25------------------------------ $300

XXV. Without further special notice to the plaintiff the defendant advertised for bids to be closed on July 5, 1921, duck listed in the official textile list #7 described as follows:

Article	Unit	Quantity
14. DUCK, gray, no blue line, 23", #4, 32 x 20. Packed 120 yards to roll. Location, Schenectady, N. Y. SPD No. 15352.	Yd......	37,701

Sales made of said duck were under substantially the same terms as in Finding XII and were in the following amounts:

500 yards at .1421	$71.05
500 yards at .1245	62.25
36,701 yards at .1205	4,422.47
37,701	4,555.77

The plaintiff was the purchaser of the larger amount at this sale.

XXVI. The same observations relative to the presence or absence of "blue line," appearing in Finding XIX above, apply in like manner to the above item of sale.

Fourth counterclaim

XXVII. Likewise, prior to date of April 19, 1920, the day for the closing of bids, the defendant offered to prospective bidders certain surplus war materials, among which items was the following:

Item No. T-2355. 72,240 YARDS MOLESKIN, O. D.—
52 inches, 17 ounces. Manufacturer unknown. Stored at Schenectady. Minimum bid considered, 500 yards. SPD No. 15351.

The terms of said sale were the same as set forth in Finding XV above.

XXVIII. Pursuant to said advertisement the plaintiff made its bid, which bid was accepted on May 7, 1920, in the following quantities and at the following prices:

5,000 yards at .8035	$4,017.50
5,000 yards at .8015	4,007.50
5,000 yards at .7985	3,992.50
5,000 yards at .7935	3,967.50
20,000	15,985.00

The letter of acceptance contained the same terms as heretofore set forth, and in accordance therewith the plaintiff sent its check for $1,598.50, being 10% of the amount of the bid. On June 4, 1920, the plaintiff sent its certified check for $8,025.00 in payment of 10,000 yards of said goods. It received in due course on this order 9,999 yards of moleskin.

XXIX. The plaintiff failed or neglected to pay for the balance of said moleskin, and on December 30, 1920, the defendant called its attention to that fact. On January 25, 1921, the defendant made further demand to forward the

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balances due, and on January 28 it repeated its request. On March 5, 1921, the defendant advised the plaintiff that unless the articles were paid for by March 31, 1921, the sale would be canceled and "the deposit retained and applied toward loss to the Government on resale of these supplies." On March 9 the warning was repeated, and again on March 14, 1921. On April 22, 1921, the plaintiff was advised that 10,001 yards of said moleskin, the subject of said sale, were then being offered for sale for plaintiff's account, bidding to be closed May 3, 1921, and that any loss sustained on the resale would be charged to the plaintiff.

Under date of April 5, 1921, defendant rescinded the sale, declared the deposit forfeited, and so notified the plaintiff May 6, 1921. Thereafter the said deposit was held and retained by the defendant.

XXX. The terms of sale were as set forth in Finding XII and the property was in the official textile list #5, described as follows:

Article	Unit	Quantity
75. MOLESKIN, O. D., 52", 17-oz. Packed 350 yards to roll. Location, Schenectady, N. Y. SPD No. 15351.	Yd......	20,000

XXXI. All bids under the foregoing advertisement were rejected. On June 3, 1921, the defendant sold moleskin, "O. D. 52," 17-oz., in the following amount, at a fixed price, by agreement with the buyer:

6,226 yards at .22........................... $1,369.72

Without further special notice to the plaintiff the defendant advertised for bidders, the bidding to close July 5, 1921, on the following item, as set forth in official list #7:

Article	Unit	Quantity
30. MOLESKIN, O. D., 52", 16-oz., 82 x 52. Packed 350 yards to roll. Location, Schenectady, N. Y. SPD No. 15351.	Yd......	4,178

The terms of this sale were as set forth in Finding XII.

XXXII. The bids at this sale of July 5, among which was one entered by the plaintiff, do not appear to have been

accepted, but a letter of acceptance, dated November 21, 1922, appears showing an auction sale November 10, 1922, of moleskin under the following description and amounts:

MOLESKIN, O. D., 52″, 17-oz., unused. SPD No. 15371.

4,179 yards at .45 .... $1,880.55

The terms of the above sale were as follows:

"*Terms.*—Twenty per cent of the bid must be paid in cash or certified check at the time and place of sale; balance within ten days from date of the sale, in cash, certified check, or letter of credit otherwise the Government reserves the right to forfeit the deposit as liquidated damages and the bidder shall lose all right or interest in the property.

"*Inspection.*—Samples of all property listed for sale in this catalogue will be open for inspection in the auction room beginning Friday, November 3, 1922, and daily thereafter (Sunday excepted) to date of sale, between the hours of 9 a. m. and 3 p. m., during which time prospective buyers will have an opportunity to inspect said property.

"In addition to the inspection of samples, guides will be furnished at the point of storage of the property to direct prospective buyers to the actual location of the property.

"No inspection of the property will be permitted during the sale.

"Failure on the part of any purchaser to inspect any property will not be considered as ground for any claim for adjustment or rescission.

"All property listed in this catalogue at said auction will be sold 'as is' and 'where is' without warranty or guaranty as to quality, character, condition, size, weight, or kind, or that the same is in condition or fit to be used for the purpose for which it was originally intended, and no claims for any allowances upon any of the grounds aforesaid will be considered after the property is knocked down to a bidder by the auctioneer.

"*Government officials not authorized to make warranty as to goods offered for sale.*—No representative of the Government is authorized to make any statement or representation as to quality, character, condition, size, weight, or kind of any property offered at this sale, and any representation or statement made by any representative of the Government concerning any such property will not be binding on the Government or considered as grounds for any claim for adjustment or rescission of any sale.

"*Note.*—All articles listed in this catalogue will be sold 'as is' and 'where is,' f. o. b. car or trucks, place of storage,

unless otherwise stated. Samples of same on display are believed to be representative and descriptions accurate. However, inspection is urged prior to sale, as no claims will be entertained should the articles vary from the samples or not come up to the expectations of the purchaser as to condition, quality, color, size, weight, width, construction, shape, or for any other reason. No claims or refunds will be entertained on account of any 'swells' or 'leaks' or damage to cans, packages, or containers, resulting from 'leaks' or from any other cause."

XXXIII. There is a difference in value of 12 to 15% between 16-oz. moleskin and 17-oz. moleskin in favor of the latter.

Fifth counterclaim

XXXIV. Likewise, prior to the bidding date of April 19, 1920, the defendant offered to prospective bidders certain surplus war materials, among which was the following:

Item No. T–2354. 8,801 YARDS MOLESKIN, O. D.—
51½ inches, 16 ounces. Manufacturer unknown. Stored at Schenectady. Minimum bid considered, 500 yards. SPD No. 15371.

The terms of said sale were the same as set forth above in Finding XV.

XXXV. Pursuant to said advertisement the plaintiff made its bid, which bid was accepted on May 7, 1920, for the total amount at $0.7815 per yard, or $6,877.98.

The letter of acceptance was as before, and in accordance therewith the plaintiff sent its check for $687.80, or 10% of the bid.

On June 4, 1920, the plaintiff sent its check for $3,126.00 in payment of 4,000 yards of these goods. In due course it received 4,000½ yards.

XXXVI. The plaintiff failed or neglected to pay for the balance of said moleskin, and on December 30, 1920, the defendant called attention to this fact. On January 25, 1921, the defendant made further demand to forward the balance due, and on January 28 the request was repeated.

On March 5, 1921, the defendant advised the plaintiff that unless the articles were paid for by March 31, 1921, the sale would be canceled and "the deposit retained and applied

toward loss to the Government on resale of these supplies." On March 9 the warning was repeated and again on March 14, 1921.

On March 23, 1921, plaintiff received a letter from defendant in which it was stated that plaintiff owed a balance of $1.95 on the shipment set forth in Finding XXXV. Plaintiff thereupon paid this amount.

On April 22, 1921, the plaintiff was advised that 4,002½ yards of moleskin, the subject of said sale, were then being offered for plaintiff's account, bidding to be closed May 3, 1921, and that any loss sustained on the resale would be charged to the plaintiff.

Under date of April 5, 1921, the defendant rescinded the said sale, declared the 10 per cent deposit forfeited, and on May 6, 1921, notified the plaintiff to that effect. Thereafter defendant held and retained the said deposit.

XXXVII. The terms of sale were the same as set forth in Finding XII, and the property was described in the official textile list #5 as follows:

Article	Unit	Quantity
74. MOLESKIN, O.D., 51½", 16 oz. Packed 350 yards to roll. Location Schenectady, N. Y. SPD No. 15371.	Yd......	8,801

XXXVIII. The bids received in response to said advertisement were not accepted, and the defendant without further special notice to the plaintiff again advertised for bids on 4,791 yards of said moleskin to be in on July 5, 1921, under the same terms as in Finding XII. The goods as set forth in item 29 of the official textile list #7 were described as shown in Finding XXXVII. The bids resulting from said advertisement, one of which was by the plaintiff, were not accepted. There appears, however, under date of November 21, 1922, an acceptance of a bid made at an auction sale held November 10, 1922, at which the following described article was sold in the following quantity and at the following price:

MOLESKIN, O. D., 5½", 10 oz., unused. SPD No. E-15371.

4,791 yards, at .41½........................ $1,988.27

The terms of said sale were as set forth in Finding XXXII.

XXXIX. There is a difference in value of about 45% between 10 and 16 oz. moleskin in favor of the latter.

Sixth counterclaim

XL. Advertisement for the sale of surplus property, bids to close April 19, 1920, was made by the defendant, among which items offered for sale, as described in the official textile list #23, was the following:

Item No. T–2356. 15,846 YARDS MOLESKIN, O. D.—
51/52 inches, 17 ounces. Manufactured by Warner Bros. Stored at Schenectady. Minimum bid considered, 500 yards. SPD No. 15370.

The terms of sale were as set forth in Finding XV.

XLI. Pursuant thereto, the plaintiff made its bids, which were accepted May 7, 1920, in the following amounts and at the following prices:

3, 000 yards at .8315	$2, 494. 50
3, 000 yards at .8215	2, 464. 50
3, 000 yards at .8115	2, 434. 50
6, 846 yards at .8015	5, 487. 07
15, 846	12, 880. 57

Plaintiff advanced its check in the sum of $1,288.06, being 10% of the bid, and requested a two-yard sample of these goods, which was sent in due course.

XLII. The plaintiff failed or neglected to pay for said moleskin, and on November 26, 1920, the sale was canceled by the defendant.

It does not appear by competent evidence that the defendant made any demand on plaintiff for the fulfillment of the contract.

The amount of the deposit was forfeited, and defendant held and retained the same.

XLIII. The defendant advertised for bids, to close May 3, 1921, on the following, as described in textile list #5:

Article	Unit	Quantity
41 MOLESKIN, O. D., 51/52", 16 oz., 80 x 52. Packed 400 yards to roll. Location Schenectady, N. Y. SPD No. 15370.	Yd.	15,837¾

In response to bids thereon it sold the following amount on June 15, 1921:

1,000 yards, at .19 .... $190.00

The terms were the same as set forth in Finding XII. It also sold by a fixed price agreement:

MOLESKIN, O. D., 51/52″, 16 oz., 80x52.

10,000 yards, at .20 .... $2,000.00

The defendant further advertised for bids to close July 5, 1921, 4,837 yards of moleskin which it described in item No. 27 of official textile list #7 in the same manner as set forth in textile list #5 above and in response to bids thereon sold:

4,837 yards, at .20 .... $967.40

The terms of sale were the same as in Finding XII.

The finding in XXXIII as to difference in value applies equally to the above moleskin.

Seventh counterclaim

XLIV. The defendant likewise advertised for sale, the bidding date to close June 7, 1920, certain surplus war materials, among which in the official textile list #26 was the following:

Item No. T–2679. 152,532 YARDS TWILL, Gray—
35″, 2.72 yd. 120x72. Manufacturers unknown. Stored at Boston. Minimum bid considered, 500 yards. SPD No. 15376.

The conditions of sale were the same as those set forth in Finding VIII.

XLV. The plaintiff submitted its bids, which were accepted in the usual form on June 25, 1920, for the following amounts:

Sale No.		
25606	50,000 yards, at .3155	$15,775.00
25608	50,000 yards, at .3055	15,275.00
25609	49,532 yards, at .3030	15,008.20
	149,532	46,058.20

The plaintiff sent its three checks in combined amount of $4,605.82, being ten per cent of the amount of the bids.

The plaintiff also sent its check on June 24, 1920, for $3,155.00 for 10,000 yards of the twill in sale No. 25606. In acknowledging receipt thereof the defendant made demand for the balance of the $15,775.00 bid on this particular yardage.

The plaintiff also requested a five-yard sample of the other two yardages. Three sample yards of twill in sale No. 25608 and a five-yard sample of twill under sale No. 25609 were shipped to plaintiff, and on July 7, 1920, the defendant made demand for the amount bid on these two sales.

Plaintiff's order of 10,000 yards under sale No. 25606 was filled to an amount of 9,267¼ yards and shipped July 21, 1920, after repeated demand by the plaintiff.

On July 26, 1920, the defendant made demand for payment of the balance of sale No. 25606. To this demand plaintiff replied asking for a thirty-day extension, which extension was granted until August 29.

On September 13, 1920, the defendant again made demand for balance on the sale, and the plaintiff replied asking for thirty more days' extension.

Meanwhile on August 3 the balance of sale No. 25608 and on August 4 of sale No. 25609 was demanded of plaintiff. These demands were, respectively, repeated August 30 and September 2. Under date of September 15 plaintiff asked for thirty days' additional time on sale No. 25609.

On the same date defendant again demanded payment of sale No. 25608. This was repeated October 4. To this latter demand plaintiff replied asking for thirty days' additional time.

On October 16, 1920, the defendant applied an amount of $3.34 due plaintiff on another sale to the amount claimed to be owing on sale No. 25608.

On October 20 defendant again made demand for consummation of all three sales. The plaintiff's request for thirty days' extension of time on sale No. 25608 was on November 4 granted by defendant.

Demand for payment on sales Nos. 25606 and 25609 was repeated November 22 and on December 8 for sale No. 25608. These were repeated December 11 as to Nos. 25606 and 25609.

On or about January 20, 1921, the defendant canceled the said three sales, declared the deposit forfeited, and thereafter held and retained the same.

XLVI. Under date of February 1, 1921, the defendant issued its advertisement for bids to close March 1, 1921, on the following twill, as described in Circular Proposal No. N. E. 11:

Item No. 21. 143,246 YARDS TWILL (ALBERT), GRAY—35'', 2172. Minimum bid considered, 500 yards. SPD No. 15376.

The terms of sale were as follows:

"At least ten per cent (10%) of the entire amount of the bid in the form of a certified check, cash, assigned registered Liberty bond, or unregistered Liberty bond shall accompany bid as a guarantee to fulfillment. Checks must be certified and made payable to finance officer, Boston. Purchaser must make payment in full before supplies or material are delivered and must remove same within 30 days.

"No alterations or modifications of the terms of purchase will be permitted.

"Inspection of supplies or materials is invited.

"All material will be sold 'as is,' and under no consideration will a refund or adjustment be made on account of supplies not coming up to the standard of expectation."

XLVII. As a result of said advertisement the defendant, on March 9, 1921, accepted the following bid:

143,246 yards, at .13½ ---------------------- $19,338.21

XLVIII. The description of the twill in the textile list #26 (as set forth in Finding XLIV) indicated what is known as a four-leaf twill, a cloth having sturdy wearing qualities.

"Albert" twill is a special twill made of softer yarns and not possessing the wearing qualities of other twill. There is not so much of a demand for Albert twill as for the four-leaf twill.

Eighth counterclaim.

XLIX. On April 29, 1921, the plaintiff purchased from the defendant 138,910 yards of duck, for which it agreed to pay the bid price of $71,168.63. The terms of sale as set forth in the surplus textile list #22, being the advertisement

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sent out by the defendant, were as set forth in Finding XV. The duck was therein described as follows:

Item No. T-2212. 651,210 YARDS DUCK—
12.4 oz., B. L., O. D. 45-inch; 18.9 oz. per linear yard. 47x27. Manufacturer unknown. Stored at Jeffersonville, Indiana. Minimum bid considered, 500 yards. SPD No. 14047.

The plaintiff made a 10% deposit, but failed to make payment of balance, and the sale was on October 7, 1920, canceled. On October 11, however the plaintiff sent its check for the balance due and the sale was reopened. The plaintiff withdrew 2,000 yards of said duck, found that it comprised "seconds," and on October 27, 1920, requested the defendant to make an allowance of 10% on the purchase price. The defendant's inspector made inspection of the lot withdrawn by plaintiff and reported that he found certain of the rolls to be ripped from one to three yards at the beginning of each piece and that certain of the bales contained one "raw selvage." The depot quartermaster at the point of storage reported that the remaining duck in plaintiff's consignment contained from two to two and one-half per cent seconds, which was indicated by "manufacturer's allowance string appearing on selvage, also most of the bales bear shippers' tags showing the quantity of seconds in each bale."

L. On December 27, 1920, the local board of sales control considered the claim, authorized a cancellation of the previous sale, and the issuance of another acceptance at an allowance of 5%.

On January 3, 1921, the second acceptance at the original bid, less $3,558.43, being 5%, was made by the defendant, the plaintiff agreeing to release all further claim arising out of said sale.

On February 1, 1921, the local sales board reconsidered this claim, and in accordance with its orders the third acceptance was issued February 10, 1921, for the original bid, less 10%, or $7,116.86.

On February 18, 1921, the plaintiff made request for a complete cancellation of the contract. This was denied, and the plaintiff on March 2, 1921, signed the acceptances and

requested payment of the refund. Refund of $7,116.86 was made on March 29, 1921, from the "Special deposit account of the disbursing office," maintained, in whole or in part, from proceeds of sales.

On October 15, 1923, demand was made by the defendant for a return of the amount refunded, which the plaintiff, on October 18, 1923, refused.

There is no proof of want of authority upon the part of the officials making this refund to act.

Ninth counterclaim

LI. On April 29, 1920, the plaintiff purchased from the defendant 80,000 yards of duck, for which it agreed to pay the bid price of $53,320.00. The terms of sale as set forth in the surplus textile list #22, being the advertisement sent out by the defendant, were as set forth in Finding XV. The duck was therein described as follows:

Item No. T-2214. 117,595 YARDS DUCK—
12.4 oz. B. L., O. D. 59½ inch; 25 oz. per linear yard; 49 x 30. Manufactured by J. Spence Turner Co. Stored at Jeffersonville, Ind. Minimum bid considered, 500 yards.

Plaintiff made a deposit of $5,332.00, being 10% of the amount of the bid, and accepted shipment of 7,005 yards on or about August 12–14, 1920. It does not appear whether or not the plaintiff subsequently removed the remaining yardage.

The plaintiff failed to make payment of the balance of the bid, and on October 7, 1920, the sale was canceled by the defendant.

By reference to the allegation of the counterclaim and the admissions in the answer thereto it appears that the plaintiff paid to the defendant the full sum bid—to wit, $53,320.00—but the date of such payment does not appear.

However, it appears that the local board of sales, under date of November 24, 1920, approved the action of the surplus property control officer in reinstating the said sale.

LII. Under date of October 27, 1920, the plaintiff's representative communicated with the defendant, as follows:

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Sales No. 19468

DEAR CAPTAIN DIEMER: I have been instructed by the Lamport Manufacturers Supply Co., 507 Broadway, New York City, to present for your consideration and action a claim with relation to merchandise sold under the above sales number. This related to SPD No. 14946, item 2214, from Textile List #22—Duck, O. D., 12.4, 59½ inch, blue line, 80,000 yards, purchased at an average price of $0.6665. Merchandise at the time of sale was located at Jeffersonville, Ind., and is now entirely paid for by the purchaser.

The Lamport people have received 5,000 yards of same, and examination discloses the fact that the merchandise is in reality 29½-inch material, due to the fact that it contains three blue lines down the center, and disposition of same will incur loss for this reason. I am inclosing sample taken from the delivery, which, besides showing the blue lines in question, indicates inferior merchandise (seconds), evidenced by the manufacturer's allowance string at selvage. The circular of Textile List No. 22 makes no mention of the blue center lines, and though a blue line is mentioned, the purchaser is justified in his conclusion that such reference is to selvage only.

I therefore request that the letters of acceptance covering this sale of 80,000 yards be canceled and in their place new ones issued to cover duck, O. D., 12.4, 29½ inch, 160,000 yards at 32 cents per yard, less 10% for one raw selvage which will result, and a further 5% for a splitting charge; net new billing price at $0.272 per yard. This will involve a refund of $9,800.00. Market price to-day of 29½-inch 12.4 is between 31 and 32 cents.

As 75,000 yards of this shipment is still in Jeffersonville, examination can be readily made, and if you desire to inspect the 5,000 yards upon which the above claim is based, the merchandise may be seen at the office of the Lamport Manufacturers Supply Co. in New York City.

I do not care to press the claim of seconds with relation to this entire quantity, as I do not believe the entire yardage is so, the 5,000-yard lot appearing to be about 20% inferior merchandise.

I ask that you kindly advise me in due course what action you take with relation to this matter.

Very truly yours,

J. C. SKINNER,
By WM. B. M. MILLER.

Captain J. E. DIEMER,
Contracting Officer, Surplus Property Division,
Munitions Building, Washington, D. C.

An investigation by the defendant resulted in the local board of sales control, on December 28, authorizing the cancellation of the sale as originally made and the "making of a new award to claimant covering the material at the price bid less 5% on account of splitting charges, and an additional 5% on account of raw selvage that will result."

LIII. On receipt of information of the board action the plaintiff reiterated its original request and made the further request that if this was not allowed that the sale in its entirety be canceled.

The board reconsidered the claim, and on January 10, 1921, awarded an additional 5% on account of raw selvage.

On January 28, 1921, plaintiff again requested a cancellation of the sale, and the board reconsidered, on February 1 adhered to its previous decision, and instructed plaintiff to remove the goods.

A new letter of acceptance of the original bid, less the 5% and 10% allowances made, was issued under date of February 10, 1921, and on March 2, 1921, the plaintiff returned the same signed and requested that the amount refunded be returned. In accordance therewith defendant sent its check for $7,731.40 on March 29, 1921, making payment from proceeds of sales.

The new letter of acceptance contained the following:

"With acceptance of this Form 13 the purchaser agrees to release all further claims arising out of this sale."

There is no satisfactory proof of want of authority upon the part of the officials making this adjustment to act.

Tenth counterclaim

LIV. Advertisement for the sale of surplus property, bids to close April 19, 1920, was made by the defendant, among which items so offered for sale, as described in the official textile list #23, was the following:

Item T-2357. 5,531 YARDS MOLESKIN, O. D.—
56 inches, 17 ounces. Manufacturer unknown. Stored at Atlanta. Minimum bid considered, 500 yards. SPD No. 15552.

The terms of sale were as set forth in Finding XV.

LV. The plaintiff made its bid for the entire amount at \$0.8615, which, on May 7, 1920, was accepted. The consideration was \$4,764.96 and the plaintiff sent its check for 10% of the amount bid, or \$476.50. It requested the shipment of a two-yard sample, which was sent immediately.

The plaintiff made no further payments, and on December 14, 1920, defendant made demand for the same. No response being made, the sale was canceled by the defendant July 18, 1921.

It appears by a letter of acceptance, dated November 15, 1921, that 5,531 yards of "Moleskin, O. D. New," were sold by the defendant at \$0.27¾, or \$1,534.85. The sale was by auction. The terms of sale or the description of the goods in the advertisement of sale do not appear.

The 10% deposit was by the defendant declared forfeited, and defendant thereafter held and retained the same.

Eleventh counterclaim

LVI. Under date of September 8, 1919, the defendant accepted plaintiff's bid of \$31,000.00 for 100,000 yards of duck, described in the advertisement of sale as follows:

Article	Unit	Quantity
24. DUCK, S. L. Gray. 35", wgt. 1.90. Manufacturer unknown. Location, Boston.	Yd......	1,300,000

The acceptance described the goods as follows:

"DUCK, S. L. 35", 1.90. 60 x 60. Unknown. Lot #24, Boston."

Among other terms of the sale were the following:

"6. Sale without recourse as to quality or grade.

"10. Textile can be seen and inspected five days prior to sale on application to zone supply office, 461 Eighth Avenue, New York City."

LVII. Plaintiff sent its check for the full amount of the bid on October 1, 1919, and requested shipment be made. Shipment to the amount of 100,031 yards was made.

Reporter's Statement of the Case

On November 13, 1919, plaintiff sent the following:

To: Zone Supply Office, Surplus Property Division, New York City.

Subject: SPD No. 1931 C. E., and 1925 C. E.

1. Sale was made to us from lot No. 24, 100,000 yards. It was guaranteed to us that these goods are fast selvage goods counting at least 60x60. Instead we have received all with the exception of 3 bales which are Bliss-Fabian make, raw selvage, and counting much below 60x60.

2. We are entitled to an allowance on this lot of at least 4¢ per yard.

3. We find on close examination that these are all Bliss-Fabian make Bates manufacturing goods, which count 56x52 instead of 60x60, as they were guaranteed.

4. We ask you to please give this matter your early attention, and oblige.

Yours very truly,

THE LAMPORT M. S. CO.

AML/LT

After an investigation of the facts by defendant's representative the surplus property officer on December 9, 1919, authorized an allowance of 10%. Thereafter the sum of $3,100.96 was paid by defendant to the plaintiff from proceeds of sales.

There is no satisfactory proof of want of authority upon the part of the officials making this adjustment to act.

Twelfth counterclaim

LVIII. On or about July 22, 1921, the plaintiff contracted to buy a certain yardage of sheeting for $7,973.07, took delivery thereof, and paid the defendant $7,273.07 on or about July 23–28, 1921. The terms of the acceptance were as hithereto set forth in Finding X.

The plaintiff has failed to make payment of the balance due, to wit, $700.00.

Thirteenth and fourteenth counterclaims

LIX. By "negotiation" and a letter of acceptance dated May 23, 1921, the plaintiff purchased from the defendant 223,419 yards of duck, at various prices, totaling $35,933.41.

The letter of acceptance set out the description, amount, and values as follows:

Material	SPD #	Quantity	Unit price	Total price
Duck, gray, R. S. 36″, #6	14916	54,421 yd. at	.14	$7,618.94
Duck, gray, R. S. 36″, #6	14917	59,223 yd. at	.14	8,291.22
Duck, gray, R. S. 48″, #4	16012	7,320 yd. at	.23	1,683.60
Duck, gray, R. S. 48″, #4	16376	7,455 yd. at	.23	1,714.65
Duck, gray, R. S. 42″, #6 B. L	2431CE	95,000 yd. at	.175	16,625.00

The terms of the acceptance were as set forth in Finding X, and in addition thereto the following appears:

"'As is and where is,' Material must be removed within thirty days from date of this award or same will be placed in public storage at purchaser's risk and expense."

LX. On June 21, 1921, plaintiff sent its check for $3,398.25, covering two SPD No. 16012 and 16376, amounting to 14,775 yards, and requested delivery. On July 15, 1921, it sent its check for $1,400 in payment of 10,000 yards of duck SPD Nos. 14916 and 14917, and check for $875 in payment of (as the letter stated) 5,000 yards of the duck under SPD No. 2431CE and requested shipment.

On July 1 shipment of 14,776 yards of SPD Nos. 16012 and 16376 was made, and on July 30 shipment of 9,967 yards of SPD Nos. 14916 and 14917 and 5,015½ yards of SPD No. 2431CE was made.

On September 10, 1921, the local board of sales control extended the sale time to October 1, 1921.

Plaintiff's check for $23,821.79 was sent to defendant September 30, 1921.

On October 14, 1921, 25,001 yards of SPD Nos. 14916 and 14917 were shipped to the plaintiff, and on November 5, 7, 8, 1921, 58,643 yards in one lot and 20,029 in another lot of the same were sent.

November 23, 1921, 25,029¼ yards of SPD No. 2431CE and December 5, 1921, 64,829 yards of the same were shipped.

LXI. Under date of February 17, 1922, a public voucher was issued to the plaintiff, in which the following statement of account is made:

Reporter's Statement of the Case

Date	Article	Quantity	Unit price	Amount
	Amount received			$35,930.07
Dec. 14, 1921	Gray duck:			
	36″, #6, Value $15,909.60	113.640 yd	$0.14	
	48″, #4, Value 3,398.48	14.776 yd	.23	
	42″, #6, Value 16,602.91	94,873¾ yd	.17½	
	35,910.99			35,910.99
	Sale No. NE-1678, due purchaser			19.08
	$2,796.43 transferred from Sale No. 4572. 1,033.68 transferred from Sale No. 25606. 1,254.22 transferred from Sale No. 25608. 1,350.70 transferred from Sale No. 25609. 29,495.04 funds received on this sale (NE-1678).			
	35,930.07 Total			19.08

LXII. Sales Nos. 25606–8–9, above set forth, are the ones which are the subject of counterclaim number seven. The evidence does not disclose the reason for the transfer of the funds above to the credit of the instant sale, the authorization therefor, or the effect, if any, on the facts developed from the evidence relative to the seventh counterclaim.

On March 10, 1922, the defendant sent its check to plaintiff for $19.08.

It does not satisfactorily appear from the proof that the said sum of $19.08 was improperly or illegally paid by the defendant.

Fifteenth counterclaim

LXIII. The evidence introduced by the defendant is neither competent nor sufficient to support the allegations of the fifteenth counterclaim.

LXIV. It does not satisfactorily appear that the goods claimed to be resold were the identical goods which were the subject of original sale to the plaintiff, nor that the prices realized on the alleged resales were the market values of the property at the time and place of delivery.

LXV. The understanding between the parties in the case of each of the foregoing counterclaims was that the 10 per cent deposit was in the nature of liquidated damages to be retained by the defendant for failure, if any, by the plaintiff to comply with its contract.

LXVI. The defendant did not use reasonable diligence, care, and judgment in the alleged resales of the property.

The court decided that plaintiff was entitled to recover $30,279.60, less $700 due the Government under counterclaim 12, leaving a balance of $29,579.60. Remainder of counterclaims dismissed.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff is suing to recover a sum which is admittedly due it. Its claim grows out of a sale to it of surplus war property, for which it paid the full amount of its bid. A small portion of the material was delivered to it, and, thereafter, the defendant, finding that it was unable to deliver the balance, notified plaintiff that the contract was canceled and that a credit had been given it for the undelivered portion of the goods at the purchase price. Plaintiff repeatedly requested the payment of this credit, but it was refused. Thereupon it sued in this court. It was entitled at least to a refund of this balance of the purchase money. *Shanhouse* v. *United States*, 61 C. Cls. 840; *Brody* v. *United States*, 64 C. Cls. 538, decided February 20, 1928; and *Hummel, trustee*, v. *United States*, 58 C. Cls. 489, 494.

In defense defendant has interposed fifteen counterclaims, involving unsettled and contested matters in each case, as it claims, between it and the plaintiff. Each counterclaim grows out of a sale or attempted sale of surplus war material. It is to be noted that each one is in itself a lawsuit.

The purchase involved in the plaintiff's claim was made on March 10, 1920, and the rescission of the sale was on April 18, 1921. The sales in 12 of the counterclaims were made between August 30, 1920, and June 25, 1921, one in July, 1921, and one in September, 1919. The plaintiff's petition was filed on November 21, 1923; the defendant's counterclaim on April 29, 1926. It will be seen that the greater number of these claims were over three years old at the time of the filing of plaintiff's petition, and over five years old at the time of the filing of the counterclaim, and had been allowed to sleep in the department without any action being taken against the plaintiff or any effort being made by action to collect them prior to this suit.

Nearly all of these alleged sales were effected through the medium of advertisements, submission of bids, and acceptance thereof.

In each case the bidder, the plaintiff in this case, was required before acceptance to deposit 10% of the purchase price with the defendant as "liquidated damages" in case of failure to carry out the contract of sale. As a net result of the deposits in some of these cases the Government collected and retained the equivalent of about $21,000.

A number of suits have been heard in this court involving a great variety of material and growing out of sales of surplus war supplies. These materials were stored at different points in the United States as the utilization of them required. Some of the supplies were perishable, some inadequately stored and protected, and nearly all were depreciating in value with the passing of time. They could not be used by the Government in time of peace. Congress therefore authorized their sale by passing the act of July 9, 1918, 40 Stat. 850, giving the President full power to dispose of all surplus material upon such terms as he deemed expedient, and, as we held in the case of *Levy & Brothers* v. *United States*, 63 C. Cls. 126, he was thus authorized to make these sales through the head of any executive department, to make regulations controlling them and naming terms and conditions, and to provide for adjustments of claims arising out of the sales when the circumstances warranted it.

Later, on July 11, 1919, 41 Stat. 104, c. 8, Congress authorized the Secretary of War to sell any surplus supplies upon such terms "as may be deemed best."

By virtue of these acts, and under authority of the President, the Secretary of War created the office of director of sales. Thereafter there was created a sales organization, known as the surplus property division, which operated as a branch of the Quartermaster Corps, and through this organization the quartermaster supply officer in charge of the surplus property was authorized to create local boards of sales control. Through these boards the sales of the property were made in different localities.

Any careful person of ordinary judgment having control of the sale of this property, and knowing its variety and

the conditions under which it was stored, would anticipate that in the great number of sales to be made there would necessarily be irregularities, mistakes, and disputes in connection with the deliveries of this scattered and diversified mass of material, and also that it would be necessary, on account of its perishable character and imperfect storage, to dispose of it as rapidly, and with as few complications, as possible.

To secure as speedy a disposal of the material as possible it was wisely provided in each of these sales that the purchaser, upon acceptance of the bid, should deposit 10% of the amount of his bid as liquidated damages and to guarantee performance. By liquidated damages is meant a certain sum agreed upon by the parties in advance which shall be paid or retained in lieu and satisfaction of any claim for damages which may arise out of a breach of the contract by the purchaser and a failure to take and pay for all or any part of the material. This provision for liquidated damages would enable the Government, on the failure of the purchaser to comply with his bid and to take and pay for the goods, to appropriate the 10% as liquidated damages for breach and promptly sell the material, instead of retaining it and waiting for the possible fulfillment of the contract or a suit for damages.

We hold and the court has found that the payment of 10% was in the nature of liquidated damages.

It was necessary, too, that authority should be given in cases where there were discrepancies in the identity, quantity, or deliveries of the goods sold to make reasonable adjustments and settlements covering the defaults, in order that the sales might be closed and the goods disposed of. The orders and regulations issued by the President and the Secretary of War under authority of the acts above cited confirm the foregoing views.

The counterclaims here are fifteen in number. In seven of them, on the failure of the plaintiff to pay for and take the goods after the payment of the 10% as liquidated damages, the defendant rescinded the contracts, retained the 10%, and thereafter conducted alleged resales of the goods as the prop-

erty of the plaintiff. In three of the counterclaims there were discrepancies and defaults in the delivery of the goods, and settlements were made by the authorized agents of the defendant, under which refunds in small amounts were made to the plaintiff. In one counterclaim there is no proof of any kind. In two there was a payment of $19.08 to plaintiff, the details of this settlement not being given; but so far as appears, the settlement was made by authorized representatives of the defendant. In one counterclaim a small balance is shown to be due by plaintiff to defendant. The refunds were made from the proceeds of the sales.

While counterclaims are allowed to be interposed in suits of this character, the proof of them by the defendant must be full and satisfactory—that is to say, the defendant in the case of each counterclaim must prove its case. In the case of the alleged resales, it must prove that title passed to the plaintiff under the original sale, as it was supposedly acting as agent for plaintiff when it made the alleged resales; also, that the goods resold were the identical goods originally sold to the plaintiff; that it exercised reasonable diligence, care, and judgment in making the alleged resales; and, in the cases of refunds, among other things, that the officers making the refunds were without authority to do so.

It is elementary that it is the policy of the courts to encourage settlements and, wherever it is possible, to uphold them in order to discourage litigation.

The courts will assume that an officer, in the performance of an official act, not only took all necessary preliminary steps required but acted within the circumference of his authority. There is a presumption in favor of the legality of his official act (*United States* v. *Coe*, 170 U. S. 681, 697), which must be overcome by satisfactory proof that the officer exceeded his powers (*Fouvergne* v. *United States*, 18 How. 470), and the court has found that there is not satisfactory proof of want of authority upon the part of the officers making the refunds in this case.

It is well settled that in a case against a vendee for not taking and paying for property, the vendor has the choice ordinarily of one of three methods to indemnify himself:

"(1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price." *Williston on Sales*, vol. 2, sec. 555, p. 1385.

This statement of the law has been often quoted with approval.

In seven of the counterclaims defendant rescinded the contract and retained the 10% of the purchase price paid as liquidated damages. The rescission of the contract, and retention of the 10% as liquidated damages would prevent defendant's recovery. See *Hickey* v. *United States*, No. H–8, this day decided (*post*, p. 729). In this case the Government in argument and brief urged this view of the law. But, more than this, by the rescission of the sale the vendor elected to keep the property as its own, and its remedy, under these circumstances, was to sue for the difference between the market price at the time and place of delivery and the contract price. The court has found that there is no evidence of the market price.

Having rescinded the contract and made the property its own, it necessarily follows that a resale of the property was the resale of its own property and not the plaintiff's, and any loss was its loss. But even assuming that it was the property of the plaintiff, and that the resale was made at the latter's risk and expense, it has been found that there was no satisfactory proof the property alleged to have been resold was the identical property originally sold the plaintiff, and that the defendant in making the alleged resales did not exercise reasonable diligence, care, and judgment. We hold, therefore, that counterclaims 1, 2, 3, 4, 5, 6, 7, and 10, where the sales were rescinded, 10% retained, and resales alleged to have been made, can not be sustained and must be dismissed.

As to counterclaims 8, 9, and 11, which involve settlements and refunds, the defendant claimed that the officers making the refunds were without authority to do so. Aside from

the disposition of the court to uphold settlements, and the presumption that the officer making the settlements performed his duty, the court has found that there is no proof of the absence of the necessary authority. These counterclaims, therefore, can not be allowed and must be dismissed.

As to counterclaims 13 and 14, under which by a settlement $19.08 was paid to the plaintiff, there is no proof that this was improperly and illegally done.

As to counterclaim 15, there is no proof.

As to counterclaim 12, there is due by the plaintiff to the defendant the sum of $700, which should be deducted from the amount of plaintiff's claim in this case, and the plaintiff given a judgment for the balance. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

DYER & COMPANY v. THE UNITED STATES

[No. B-119. Decided May 28, 1928]

On the Proofs

Contracts; general agreement; verbal purchases confirmed by formal orders; breach.—See *Miller et al.* v. *United States, ante*, p. 506.

The Reporter's statement of the case:

Mr. Robert T. Scott for the plaintiff. *Messrs. Frank Davis, jr.* and *William D. Harris* were on the brief.

Messrs. John E. Hoover and *Charles F. Kincheloe*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. McClure Kelley* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff, Dyer & Company, is now, and was during all of the times hereinafter mentioned, a corporation organized and existing under the laws of the State of Delaware, and engaged in the business of buying and selling hay, straw, oats, and other forage, with its principal place of business at Kansas City, in the State of Missouri.

II. In June, 1917, the Government of the United States, as a necessary incident to its participation in the World War, began to establish a large number of training camps throughout the United States, principally in the West and Southwest. Thousands of horses and mules were required at these camps, with the resultant necessity of large purchases of hay, straw, oats, and other forage, for quick delivery. The entry of the Government into the forage market forced the price of forage to an unreasonable level. The ordinary methods of purchasing forage became impracticable, resulting in inadequate supplies of forage at some camps and congestion at others.

Conferences were held between the duly authorized officers of the Quartermaster's Department of the United States Army and many of the hay and forage dealers. At these conferences the Government officials solicited the assistance of the hay dealers to keep the price of hay and forage from rising beyond a reasonable figure, and at the same time to secure prompt deliveries of adequate amounts of forage wherever required. It was apparent that the Government's method of advertising for bids for a large quantity of forage for delivery over a long period of time would necessarily force the market to a point deemed unreasonable. No contractor could assume the risk of contracting subject to Government inspection and rejection at destination for distant future delivery at a fixed price when there was no means by which the market could be controlled.

Under Army regulations in force at that time, all commodities were required to be bought on competitive bids, but the regulations provided that if the competitive bids were not satisfactory they could be rejected and in emergency cases purchases could be made on the open market. Under the existing emergency the Government adopted the plan of advertising for bids for hay, straw, and other forage, and such bids as were made at prices considered fair and reasonable were accepted. Where the prices were unreasonable, the bids were rejected and the Government went on the open market and made emergency purchases.

As a result of the conferences held between the representatives of the Government and the representatives of the

hay and forage dealers it was understood and agreed by and between the Government representatives and the hay dealers, among whom was plaintiff, that the method theretofore followed by the Quartermaster's Department of purchasing hay by formal advertisement and proposal would be discontinued, and that the purchase of forage would be handled on a commercial basis, and according to the rules and custom of the trade which had been established between commercial buyers and sellers of hay and other forage; that the Quartermaster Corps would wire or telephone for quotations when hay was needed and would accept same verbally over the telephone or by wire and would designate the destination and would confirm the order by formal purchase order; that the Government would have the hay graded at destination by competent inspectors according to the rules of the National Hay Association; the Government to furnish suitable cars at the point of origin for the transportation of said hay and forage, to give shipping instructions at the time orders were given, and to instruct the receiving railroad to place cars for the particular contract.

The rules and customs of the commercial trade, in so far as they apply to this case, are as follows:

"The inspection is to be made by competent and able inspectors, in accordance with the rules of grading existing in the trade, which are the same as the rules of the National Hay Dealers Association.

"The inspection shall be made on the day the car of hay arrives at destination.

"If rejection is made the contractor shall be immediately notified, as claims on account of rejection must be made to the original seller within thirty days from the date of sale and within ten days after rejection. Information must be given in the notice of rejection by the person rejecting the hay to enable the contractor and the original seller to determine the reasons therefor.

"Partial rejections are not allowed, unless the consent of the shipper has been first secured. The cars must be accepted or rejected in their entirety.

"The regrading of hay to a grade lower than that called for in the contract, or the repricing of hay at a price lower than that called for in the contract, is not allowed by commercial custom, unless the consent of the buyer has been first secured.

Reporter's Statement of the Case

"Under commercial custom the actual weight of the hay in the car is controlling. If the consignee claims a lesser weight than that claimed by the consignor, he must support his claim by a certified scale certificate. This certificate must be sent to the shipper within five days after unloading the car, in order that he may make claim against the person from whom he purchased the hay. The time fixed by commercial practice for making such claim is thirty days.

"Railroad weights are not accepted as accurate in commercial practice. Unless the hay is actually weighed as above described and evidence thereof given to the shipper, a certified invoice, scale ticket, or weight certificate of the person actually weighing the hay when shipped is conclusive on the parties.

"Under commercial practice all demurrage accruing against the cars being held for inspection, even though the cars are afterwards rejected, is paid by the consignee.

"Under commercial custom cars reconsigned by the consignee after receipt at the original destination to another destination are deemed to be accepted by him."

After the adoption of this plan the Quartermaster Corps advertised that it would buy hay from any person in quantities of five cars or more. All the hay and forage dealers with whom the department proposed to do business, including plaintiff, were informed that this would be the method used by the Quartermaster's Department in its future dealings with them, and the plan was embodied in a circular sent by mail to the different hay dealers. This plan or proposal was personally communicated by Major Albert B. Warren, the officer in charge of the buying of hay and grain for the forage branch of the Army, to representatives of plaintiff, and was agreed to by both parties as the basis on which they would transact business in the future.

In order to carry out this plan it became necessary for plaintiff and the other hay dealers doing business with the Government to make bids on quantity requirements for the various camps. When a contractor was called upon for a bid or submitted a bid and it was accepted, it was later reduced by the Government to writing in the form of a letter of acceptance or in the form of a purchase order, containing order number, date, shipper's name and address, grade, and quality of the forage desired, the quantity, price per ton,

schedule of delivery, and shipping directions. These letters of acceptance and purchase orders were supplemental to the verbal agreement originally entered into. In some cases the offer was oral and confirmed by written order. In other cases both offer and acceptance were written, and in still others the bid was written and was accepted on its face by the proper officer of the Government. There were frequent delays between the time of placing the order and the issuance of the written form; sometimes the hay would be in transit before the purchase order was received, and at other times a blank order would be issued leaving the amount and price blank.

By the terms of the oral agreement all orders were to cover periods of thirty or sixty days, not over sixty days, for the time of completion, and the Government was to pay 80% of the invoice when it was attached to sight draft with bill of lading, and the balance of 20% was to be paid promptly on the inspection, weighing, and unloading of the hay at destination, not to exceed thirty days from the time of shipment. In many cases the Government fell behind in both its 20% and 80% payments. Sometimes the Government was behind as much as sixty days on its 80% payments and often many months on the 20% payments.

During the period that the hay in question was being shipped the majority of the cars furnished by the Government for the shipment of hay and forage were in poor condition, having leaky roofs and doors. As a result of the condition of the cars some of the hay was damaged in shipment. Under commercial custom, where the contents of a car are found damaged by reason of the condition of the car, the buyer is required to immediately notify seller, so that the seller can notify the railroad company. The railroad company requires that it be given an opportunity to verify statements as to the defectiveness of the car. The buyer must support the statement of damage as to the contents of the car by affidavit, and claims for damage on account of the condition of the car must be made within six months after the arrival of the car at its destination. The Government did not always report the condition of the cars to the contractor, and as a result of this failure the contractor was

prevented from making a claim to the railroad company within the period required.

III. Prior to February, 1918, officers and enlisted men were detailed to inspect and grade hay. Many of these men had had no previous experience or training in the hay business. Serious complaints of incompetency and inefficiency were frequently made by the sellers. In February, 1918, George S. Bridge was appointed chief of the forage branch of the United States Army and remained in that position until the latter part of 1918. For the purpose of securing competent hay and forage inspectors Mr. Bridge established a school at Chicago where they were to be tested. Many of the men who were assigned to the forage division were unfamiliar with hay and forage. Very few of them had had any experience in inspecting hay and forage, but some of them were reared on farms and had a limited knowledge of the kind of forage produced in their respective localities. Most of the men were sent to the school at Chicago to be instructed. While in Chicago they were given limited instructions by a competent hay inspector and were sent down on the tracks where hay and forage were being unloaded and watched the inspectors perform their duties. Many of these men were not in Chicago more than two or three days and but few of them were there for a period as long as a week.

The greater part of the hay on which the applicants were tested in Chicago was timothy hay, while the Government bought and the inspectors were frequently called upon to inspect alfalfa, prairie, redtop, and other kinds and grades of hay. Some of the men examined in Chicago and found to be the best fitted for inspectors were afterwards put on other duties. The inspectors were transferred to different camps. As a general rule, men from the western country were put in eastern camps and men from the eastern country were put in western camps. As a result, inspectors familiar with one kind of hay were sometimes sent to camps where the Government received grades and kinds with which they were not familiar. On account of the constant movement of troops there was a continuous changing of inspectors. Many of the inspectors were incompetent, and as a result of the incompetency many mistakes were made.

At times there was a great congestion of hay at some of the camps, and when hay was not needed many cars were rejected that were up to grade and in accordance with specifications. On the other hand, when a camp was in need of hay it frequently occurred that inferior grades of hay were passed by the inspectors and accepted by the Government.

At times cars were accepted by one Government inspector, forwarded to a different camp, and there rejected by another Government inspector. In some cases where cars were rejected the shipper was able to get reinspection and the hay would be accepted. In a number of cases cars of hay were rejected at camps, moved into terminal markets, and sold to commercial concerns, either on the grade originally sold to the Government or a higher grade.

The Government very seldom gave the contractor reason for rejection, except that it was not up to grade or sometimes was unfit for use, which reasons, under commercial custom, were not comprehensive enough to enable the contractor to make a claim against the seller. At times inspection slips and other necessary data were sent in very late and sometimes were never sent to the Chicago office; consequently the contractor received no notice of rejection or repricing and regrading of the cars. Frequently the contractor would not be notified of the regrading, repricing, or the rejection of hay until many months had elapsed. In the meantime he had made the final settlement with the shipper and would have no recourse against him.

On account of the isolated location of the camps to which hay was shipped there was seldom any central hay market to which the rejected hay could be sent. It had to be shipped to some near-by town where the demand was limited and the price lower. In some cases it had to be stored for a considerable length of time until a buyer could be found.

IV. On shipments covered by sixty-six purchase orders the hay was weighed by experienced weighers at the time it was loaded and weighers' certificates were furnished showing the actual number of pounds of hay in each car shipped. The Government weighers obtained weights on these cars in many different ways. Some few cars were weighed on track scales

while they were coupled to other cars, and at times some of the weights were obtained while cars were moving slowly over the scales. In other instances the weights were obtained by the Government weighers by removing a few bales and weighing them and averaging the weight on all of the bales in the car. The weights obtained by the Government weighers were incorrect and less than the weights furnished by the plaintiffs. The Government deducted from moneys due the plaintiff, on account of the difference in weights on the sixty-six shipments, the sum of $11,904.98.

V. At times the Government repriced and regraded hay and deducted a certain discount without consulting plaintiff. On shipments covered by thirty-two purchase orders the hay was graded by men experienced in the hay business at or before the time that it was loaded in the cars and was up to grade. The Government inspectors regraded all of the hay. Said hay was accepted by the Government but as of a lower grade than that specified in the contract. As a result of regrading the hay it was repriced at a lower figure than that specified in the contract. The difference between the contract price of the hay covered by the thirty-two purchase orders and the price fixed by the Government was $5,881.16, which sum was subsequently deducted by the Government from moneys due the contractor.

VI. Hay shipped by the plaintiff to the Government covered by twenty-three purchase orders was rejected as not being up to grade. This hay was graded by men experienced in the hay business at the time it was shipped and was up to grade. On account of said hay being rejected plaintiff was compelled to, and did, sell the same on the open market at less than the contract price. Plaintiff obtained the best price obtainable for said hay. The difference between the contract price and the amount obtained by plaintiff for said hay, when it was sold on the open market, was $17,008.56.

VII. Under the provisions of some of the purchase orders hay was to be shipped from any point taking a specified rate to some arbitrary point; for example, f. o. b. points taking a thirty-cent rate to Camp Travis. If the freight was more the Government was to receive the advantage of the difference and if less plaintiff was to receive the advantage of the

difference. The United States allowed plaintiff this credit on a number of shipments and made a proper adjustment, but in cases where the Government alleged there was a shortage in the weight of shipment no adjustment was made. On shipments covered by six purchase orders, where there was a shortage in the weight and the freight was less than that specified in the purchase order the Government refused to allow credit to the plaintiff for the difference. Under these purchase orders the difference was $138.76.

VIII. Three of the contracts called for delivery of hay at Fort Sill, Oklahoma. The hay covered by said contracts was delivered by plaintiff to the station. The railroad charged switching charges for delivering the car from Fort Sill to the United States military reservation, which switching charges were deducted by the United States from moneys otherwise due plaintiff. The amount deducted on these three contracts because of said switching charges was $123.60.

IX. On two purchase orders, where a definite place was named to which delivery was to be made, the Government reconsigned the cars to another point and charged contractor with reconsigning charges amounting to $6.18.

X. On three shipments made by plaintiff to the Government the cars were held for inspection for a longer time than was permitted by the railroad company and demurrage accrued. The cars were afterwards accepted by the Government, but the Government deducted the demurrage charges amounting to $71.07.

XI. Purchase orders Nos. 87, 3305, and 26–8 provided that if payment was made within twenty days from the date of delivery a discount of 1% could be taken by the Government. On these contracts the Government did not make payment until after the twenty days had expired, but in making settlement it deducted 1%, amounting to $865.40.

XII. The claim sued on in this action was filed with the Secretary of War under the Dent Act, but the claims board refused to entertain jurisdiction on the ground that the purchase orders were formal contracts within the meaning of section 3744 of the Revised Statutes.

Syllabus

The court decided that plaintiff was entitled to recover $11,904.98 set forth in Finding IV, $5,881.16 set forth in Finding V, $17,008.56 set forth in Finding VI, $138.76 set forth in Finding VII, $123.60 set forth in Finding VIII, $6.18 set forth in Finding IX, $71.07 set forth in Finding X, and $865.40 set forth in Finding XI, aggregating $35,999.71.

MOSS, *Judge*, delivered the opinion of the court:

This action was submitted with the cases of *Shofstall Hay & Grain Co.* v. *United States*, B–120, and *Albert Miller et al.* v. *United States*, B–121, on the evidence taken in the three cases. The opinion in the *Miller case*, decided as of this date, is applicable to the questions involved in the instant case. Plaintiff is entitled in this action to recover as follows:

On weight shortages	$11,904.98
Repricing and regrading	5,881.16
Total and partial rejections	17,008.56
Errors in freight charges	138.76
Switching charges	123.60
Reconsigning charges	6.18
Demurrage deductions	71.07
Erroneous discounts	865.40
Total	35,999.71

And it is so ordered.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM C. ATWATER & CO. v. THE UNITED STATES

[No. D–125. Decided May 28, 1928]

On the Proofs

Eminent domain; acts of March 4, 1917, and June 15, 1917; requisite to suit.—The procedure set forth in the acts of March 4, 1917, and June 15, 1917, for the recovery of additional compensation for a taking of materials, must be complied with before suit. See *New River Collieries Co. et al.* v. *United States*, *ante*, p. 205.

Same; authority of Secretary of Navy; acceptance of order.—The power conferred upon the Secretary of the Navy by Executive

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order of August 21, 1917, was only such as was given the President under the acts of March 4, 1917, and June 15, 1917, which was to place orders for materials "usually produced or capable of being produced" by the person with whom the order was given, and on a refusal to accept or comply with them, to seize the materials and operate the plant of the producer.

When an order was given under these statutes for the purchase of materials, the terms and prices fixed therein, and the price accepted, or the order complied with and materials delivered without formal acceptance, there came into existence a valid contract.

Same; order for coal upon sales agent.—Plaintiff was a sales agent, purchasing and reselling coal to its customers without physically handling the coal, and at the time orders were placed with it under the acts of March 4, 1917, and June 15, 1917, did not own any coal on the ground or at the mouth of a mine, or any mines. *Held*, that orders for coal, given under such circumstances, there being nothing of plaintiff's the Government could seize on failure to comply therewith, were not requisitions under said acts.

Same; statute of limitations.—The statute of limitations, sec. 156, Judicial Code, is not postponed by reason of failure to comply with the procedure prescribed in the acts of March 4, 1917, and June 15, 1917, for the recovery of additional compensation.

The Reporter's statement of the case:

Mr. Spencer Gordon for the plaintiff. *Messrs. Edgar T. Beamish* and *J. Harry Covington* were on the briefs.

Mr. James J. Lenihan, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. W. F. Norris, Howard W. Ameli*, and *George Dyson* were on the briefs.

The court made special findings of fact, as follows:

I. William C. Atwater & Company, Inc., plaintiff herein, was at all times hereinafter mentioned and now is a corporation organized under the laws of the State of New York.

II. The plaintiff, at all the times involved in this case, was engaged as a sales agent in the business of selling the output of coal produced at various mines and was independent of the operators whose coal production it marketed. It purchased and resold to coal dealers or to consumers without

physically handling it on, over, or through its own vehicle, dock, trestle, or yard.

At the time the three orders involved in this case were issued the plaintiff did not own any coal on the ground or at the mouth of a mine, nor did it own any mines. All of the coal delivered to the Navy under the said orders was purchased by the plaintiff, and was, at the time of delivery, owned by the plaintiff.

At the time it received the first of the orders hereinafter mentioned from the Secretary of the Navy, the entire tonnage of coal controlled by it had been disposed of under contract for months in advance and until the 1st of December, 1917.

III. On June 14, 1917, the Secretary of the Navy wrote plaintiff as follows:

NAVY DEPARTMENT,
Washington, June 14, 1917.

SIRS: Effective at once, please be prepared to furnish your proportion of the total quantity of coal required by the Navy for the period ending September 30, 1917; it being estimated that the tonnage which will be taken from your company during that period will amount to about 13,000 tons, delivery being required at the following-named points:

Navy Standard Mines, W. Va______________ 13,000 tons

The coal furnished will be from mines now on the Navy Acceptable List.

The price to be paid for such tonnage as you may be required to deliver is to be determined later, and, as the result of this department's decision as communicated to the committee on coal production, council of national defense, will be contingent on the cost of production, data concerning which is now being prepared. As an advance payment, however, this department will allow the unit of two dollars thirty-three and one-half ($2.335) per gross ton f. o. b. mines, although it is to be understood that any payments made at this rate will be subject to such increases or decreases as may be later decided upon as proper by reason of the ultimate decision with respect to cost of production, plus such reasonable profit as may be allowed.

It will also be understood that the figure finally agreed upon as a proper amount to be paid your company will be subject to such increase or decrease in transportation or labor costs as may be exacted of you during the period of the formal contract.

In making the allotments described herein every effort has been made to treat all suppliers equitably—consideration being given to the questions of production, convenience of transportation, and other governing factors. However, in view of the inability to reach a definite agreement as a result of the several conferences held on this subject, it has not been practical to as yet investigate as thoroughly as might be desired, so that, if it is found a possible injustice has been done to any supplier, upon receipt of satisfactory evidence bearing out such contention, steps will be taken to remedy same in subsequent allotments in the best interests of all concerned. The forms of delivery required are to be those stated under the various classes of the within schedule allotted to your company.

It is probable that deliveries under this order may be required in the immediate future and you will, therefore, make all necessary preparations to meet such deliveries as may be called for, on which it may be necessary to make telegraphic assignments.

Respectfully,

JOSEPHUS DANIELS,
Secretary of the Navy.

W. C. ATWATER & COMPANY,
1 Broadway, New York City.

On June 19, 1917, plaintiff wrote the Secretary of the Navy as follows:

WM. C. ATWATER & CO., INC.,
June 19, 1917.

Hon. JOSEPHUS DANIELS,
Secretary of the Navy, Washington, D. C.

DEAR SIR: We are duly in receipt of your letter of June 14th and notice that you have requisitioned a block of our coal for use of the Navy and for delivery up to September 30th, 1917. It seems unfortunate that the department, in fairness to itself, could not have seen its way clear in payment for this coal to give a price somewhat approximating its real value. We wish, accordingly, to respectfully register our protest against the basis of payment you have suggested and will bill the coal delivered to the department at $3.50 a gross ton at the mines. In the meantime, we have instructed our mines to make pro-rata shipments to the department on the basis of the 13,000 tons covered by your requisition, which is the proportionate part of your total requirements you feel should be shipped from our mines.

We are keenly alive to the necessities of the Government at this time and are desirous to extend the same consideration

to the Government that we feel the Government should be willing and ready to extend to us.

Yours very truly,

WILLIAM C. ATWATER & COMPANY, INC.,
By WILLIAM C. ATWATER, *President.*

IV. On August 16, 1917, the Paymaster General of the Navy wrote plaintiff as follows:

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C., August 16, 1917.

WM. C. ATWATER & CO.,
1 Broadway, New York, N. Y.:

Subject: Navy Order No. N–77.

Reference: Letter from the Secretary of the Navy dated 14 June, 1917.

SIRS: Navy Order No. N–77 is enclosed in duplicate. This is not an additional order for coal, but is issued in confirmation of the above letter from the Secretary of the Navy.

Kindly sign the original and return. The duplicate may be retained.

Respectfully,

MCGOWAN,
Paymaster General of the Navy.

The said Navy Order N–77 is printed at page 23 of the record in the addendum to the second amended petition, and is made a part hereof by reference. It provides, among other things, that it is made pursuant to the provisions of the acts of Congress, naval appropriation act approved March 4, 1917, and the urgent deficiency act approved June 15, 1917, and under the direction of the President of the United States, that compliance with the order is obligatory and that no commercial orders shall be allowed to interfere with the delivery herein provided for. Subparagraph (b) of said Navy order N–77 provides as follows:

"(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment, you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between

the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper."

It is also provided in said Navy order that it confirms and supplements the letter from the Secretary of the Navy dated June 14, 1917, which in full is a part of the order, and that plaintiff would be called upon to furnish during the period from June 14, 1917, to September 30, 1917, approximately 13,000 tons of coal at $2.335 per gross ton, f. o. b. mines—$30,355—to be delivered at Navy standard mines, West Virginia; also that transportation and other charges connected with the handling of the coal should be included in the company's bills to the Navy Department. This order was signed by the Paymaster General of the Navy by direction of the Secretary of the Navy. Below the order was the endorsement "This order is accepted subject to the conditions in paragraph (b) above" with a blank space at the end thereof for the signature of the company.

Not having received the signed copy from the plaintiff the Paymaster General wrote on September 17, 1917, requesting its prompt return. On September 19, 1917, the company returned the copy of the order with the endorsement at the foot thereof "Receipt of the above is hereby acknowledged. William C. Atwater & Co. (Inc.), by W. C. A., president."

V. On August 21, 1917, the President of the United States issued the following Executive order:

"By virtue of authority vested in me in the section entitled 'Naval emergency fund' of an act of Congress entitled 'An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes,' approved March 4, 1917, and in the section entitled 'Emergency shipping fund' of an act of Congress entitled 'An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved June 15, 1917, I hereby direct that the Secretary of the Navy shall

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have and exercise all power and authority vested in me in said acts, in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for construction of vessels for the Navy and of war materials, equipment, and munitions required for the use of the Navy, and the more economical and expeditious delivery thereof.

"The powers herein delegated to the Secretary of the Navy may, in his discretion, be exercised directly by him or through any other officer or officers who, acting under his direction, have authority to make contracts on behalf of the Government.

"WOODROW WILSON.

"THE WHITE HOUSE,
"*21 August, 1917.*"

On August 23, 1917, the President of the United States issued the following Executive order:

"By virtue of the power conferred upon me under the act of Congress approved August 10, 1917, entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' and particularly for the purpose of carrying into effect the provisions of said act relating to fuel, Harry A. Garfield is hereby designated and appointed United States Fuel Administrator, to hold office during the pleasure of the President.

"Said Fuel Administrator shall supervise, direct, and carry into effect the provisions of said act and the powers and authority therein given to the President so far as the same apply to fuel as set forth in said act, and to any and all practices, procedures, and regulations authorized under the provisions of said act applicable to fuel, including the issuance, regulation, and revocation under the name of said United States Fuel Administrator of licenses under said act. In this behalf he shall do and perform such acts and things as may be authorized and required of him from time to time by direction of the President and under such rules and regulations as may be prescribed.

"Said Fuel Administrator shall also have the authority to employ such assistants and subordinates, including such counsel as may from time to time be deemed by him necessary, and to fix the compensation of such assistants, subordinates, and counsel.

"All departments and established agencies of the Government are hereby directed to cooperate with the United States Fuel Administrator in the performance of his duties as hereinabove set forth.

"(Signed) Woodrow Wilson.

"The White House,
"23 August, 1917."

VI. On September 22, 1917, the Navy Department issued to plaintiff a document designated "Supplementary Navy Order N–77," which is printed at page 39 of the record in the addendum to the second amended petition, and is made a part hereof by reference. It provides for the delivery of United States Navy standard coal by plaintiff from October 1, 1917, to June 30, 1918, 50,000 gross tons, f. o. b. cars mines; 49,000 gross tons, at Lamberts Point, Virginia, and 2,000 gross tons at the Norfolk, Virginia, Naval Hospital. The order provided for the payment of $2.24 per ton for coal from the West Virginia district, $2.408 per ton for coal from the West Virginia (New River) district, and $2.24 per ton for coal from the Virginia district; also for the reimbursement to the company for expenses incurred in connection with the transportation and handling of the coal. This order provided on its face that it was issued pursuant to the provisions of the acts of March 4, 1917, and June 15, 1917, respectively, and that compliance with the order was obligatory, also that it was issued under the conditions stated in subparagraph (a), which was a part of the printed form used for the order and which provides as follows:

"(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted, it will be considered as constituting a formal release of all claims arising under this order."

Subparagraph (a) was modified by a typewritten insertion designated as paragraph 6 of the order, as follows:

"6. Subparagraph (a) of paragraph 1 above is hereby modified to the effect that the prices as herein stated are subject to change from time to time under proper governmental authority; it to be understood that any change in prices—if not retroactive—will apply on the delivery of tonnage made immediately subsequent to the date on which such new prices become effective, provided the contractor is not delinquent on the particular delivery in question, in which latter event the old prices will apply; if subsequent published prices are held by proper authority to be retroactive, such price adjustments as may be necessary on deliveries already made may be proceeded with under this order."

Subparagraph (c) of paragraph 1 of said order provided as follows:

"(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original order is to be signed and returned. The duplicate copy may be retained by you in either case."

At the conclusion of the order was the following: "The above board is accepted subject to the conditions in subparagraph (a). The price therein stated and fixed as being reasonable is ______ satisfactory." This was followed by a blank space for the signature of the company.

The plaintiff did not sign Supplementary Navy Order N–77 until October 20, 1917, when plaintiff wrote the following letter to the Navy Department:

WILLIAM C. ATWATER & Co.,
POCAHONTAS SMOKELESS COAL & COKE,
New York, Oct. 20th, 1917.

NAVY DEPARTMENT,
Bureau Supplies & Accounts,
Washington, D. C.

Supplementary Order N–77

GENTLEMEN: We beg to acknowledge receipt of Navy Order No. N–77, in duplicate. We return one copy of the order herewith, having endorsed our acceptance under subparagraph (a) of paragraph 1, subject to the following modification in price on deliveries made to the department under this order, between October 1st, 1917, and the end of the season of Lake navigation, which we trust will meet with the approval of the department:

Practically the entire tonnage of coal marketed by us is under contract to the end of the season of Lake navigation, which will be approximately December 1st, next.

Any tonnage delivered by us to the department on requisition under the above order, which is not required to fill our existing contract obligations, between October 1st, 1917, and the end of the season of Lake navigation, we will bill the department on the basis of $2.24 per gross ton, plus the amount of the "jobber's margin" of 15¢ per net ton in accordance with paragraph 1, subparagraph (a), and paragraph 6 of the above order.

Any tonnage delivered by us to the department on requisition under the above order, between October 1st and the end of the season of Lake navigation, that is diverted from our existing contract obligations, we will bill against the department at the price at which it has been sold by us under such contracts.

Very truly yours,

WILLIAM C. ATWATER & COMPANY, INC.,
By JOHN L. STEINBUGLER, *Secretary.*

With this letter Supplementary Navy Order N–77 was returned with an acceptance reading as follows:

The above order is accepted subject to conditions in subparagraph (a) above. The price therein stated and fixed as being reasonable is satisfactory subject to modification as per letter October 20, 1917, attached.

WILLIAM C. ATWATER & CO., INC.,
By JOHN L. STEINBUGLER, *Secretary.*

On October 26, 1927, the Navy Department returned Supplementary Order N-77 to the plaintiff with a letter as follows:

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C., October 26, 1917.

In reply please refer to No. N-77, 503-6e, 504-15a.

WM. C. ATWATER & COMPANY,
1 Broadway, New York, N. Y.

Subject: Delivery Navy allotment bituminous coal.
Reference: Your letter to S. and A., 20 Oct., 1917.

SIRS: The understanding indicated in your letter above referred, as the price to be paid on coal delivered under Navy order cited, is not correct, and, instead, there is but one price to be paid on same during the total period involved—subject only to any further revision that may be made, and which will be announced accordingly under Executive authority.

The price to be paid, f. o. b. mines, on all coal delivered, subject to the above, is $2.24 per gross ton, "West Virginia," plus jobber's commission of an amount not exceeding $0.15 per net ton—to which your company is apparently entitled under jobber's affidavit received.

The distinction in time based on the close of Lake navigation, or any other like conditions, is therefore not to be considered, and your bills for all coal delivered—in which your most active cooperation is invited—should be under the one uniform price basis above shown, as set forth in Navy order covering and all supplementary or modifying advices thereto.

It is requested, therefore, that the signed supplementary order forwarded you be promptly executed and returned, while the copy of the Navy order received with your letter above referred to, bearing your signature, is returned herewith.

Prompt response will be appreciated.

Respectfully,

——— ———,
Paymaster General of the Navy.

On November 2, 1917, the plaintiff returned Supplementary Navy Order N-77 to the Navy Department with the words "subject to modification as per letter October 20, 1917, attached" stricken from the acceptance and with a letter as follows:

WM. C. ATWATER & CO. INC.,
November 2nd, 1917.

BUREAU SUPPLIES & ACCOUNTS,
Navy Department, Washington, D. C.

GENTLEMEN: We beg to acknowledge receipt of letter from the department under date of the 26th ult., returning copy of Navy Order No. N–77. In accordance with the department's request we have executed and return herewith the signed supplementary order and have eliminated the reference to our letter of October 20th, 1917, in connection with price we bill the department on coal diverted from our existing contracts up to the end of the Lake season 1917. In view of the fact that we have a very considerable balance of tonnage to ship for Lake delivery under Lake priority order and are also shipping heavily to five by-product and steel plants in the West, all of whom we have been advised are engaged in Government business, we will appreciate it if the department will make minimum call upon us for deliveries under the above order, at least until after the first week in December.

Appreciating the cooperation of the department in this matter, we remain,

Very respectfully yours,

WILLIAM C. ATWATER & COMPANY, INC.,
By ——— ———, *Secretary*.

VII. On June 13, 1918, the Navy Dapartment issued to plaintiff a document designated "Navy Order N–3004" which is printed at page 55 of the record in the addendum to the second amended petition, and is made a part hereof by reference. It provides for the delivery by plaintiff from July 1, 1918, to June 30, 1919, of 200,000 gross tons of Navy standard coal at Lamberts Point, Virginia, and 5,000 gross tons of high-grade bituminous coal at Portsmouth, Virginia, Naval Hospital. The order provided for the payment of $2.632 per ton for coal from the West Virginia district, $3.08 per ton for coal from the West Virginia-Tug River district, $3.024 per ton for coal from the West Virginia-New River district, and $2.632 per ton for coal from the Virginia district; also for the reimbursement to the company for expenses incurred in connection with the transportation and handling of the coal. This order provided on its face that it was issued pursuant to the provisions of the acts of March 4, 1917, and June 15, 1917, respectively, and that compliance with the order was obligatory; also that it was issued under

the conditions stated in subparagraph (a) which was a part of the printed form used for the order and which provides as follows:

"(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted, it will be considered as constituting a formal release of all claims arising under this order."

Subparagraph (a) was modified by a typewritten insertion designated as paragraph 6 of the order as follows:

"6. Subparagraph (a) of paragraph 1 above is hereby modified to the effect that the prices as herein stated are subject to change from time to time under proper governmental authority, it to be understood that any change in prices—if not retroactive—will apply on any and all shipments of coal made from the mines, subsequent to the date on which such new prices become effective, provided the supplier is not delinquent on the particular delivery in question, in which latter event the old prices will apply; if subsequent published prices are held by proper authority to be retroactive, such price adjustments as may be necessary on deliveries already made may be proceeded with under this order."

Subparagraph (c) of paragraph 1 of said order provided as follows:

"(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case."

At the conclusion of the order was the following: "The above order is accepted subject to the conditions in subparagraph (a). The price therein stated and fixed as being

reasonable is ___ satisfactory." This was followed by a blank space for the signature of the company.

Upon receipt of this order by the company there ensued considerable correspondence wherein the company contended that it was being called on to furnish more than its proportion of coal. Mr. Atwater, the president of the plaintiff company, and Mr. Steinbugler, the secretary, went to Washington and protested to officials of the Navy Department and the Fuel Administration as to the amount of coal to be taken from the company and the price allowed.

By direction of the Paymaster General of the Navy there were forwarded to the plaintiff three letters in words and figures as follows:

19 JULY, 1918.

WM. C. ATWATER & Co.,
1 Broadway, New York City.

Subject: Expediting of payments applying on Navy Order N-3004.

SIRS: It is noted that the above Navy order has not been signed and returned. It will not be possible to make any payments applying on this order until after it has been received here properly signed.

The Navy is desirous that payment on Navy contracts be expedited in every possible way. It is particularly desired to avoid the delay in payment caused by nonreceipt of the signed Navy order, and it is therefore requested that the order with your company be properly executed as soon as possible and forwarded to the Paymaster General, U. S. N., Purchase Division, Seventh and B Streets SW., Washington, D. C.

Respectfully,
By direction of the Paymaster General.

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27 AUGUST, 1918.

Messrs. WM. C. ATWATER & Co.,
1 Broadway, New York, N. Y.

Subject: Public bill for $52,076.52 from navy yard, Norfolk, Va. Under Navy Order 3004.

SIRS: Public bill in your favor is being held in the disbursing division awaiting return of above-mentioned document signed, or statement of your position in the matter.

Respectfully,
By direction of the Paymaster General.

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13 SEPTEMBER, 1918.

WILLIAM C. ATWATER AND COMPANY,
1 Broadway, New York City.

Subject: Supply of coal for Navy use.

References: (a) Your letter to Supplies and Accounts 6 September, 1918. (b) Navy Order N–3004.

SIRS: After full consideration of your letter above referred to it is felt inadvisable to make any present change in the allotment as now shown in Navy order above numbered, having in view advices already definitely given that it was the intention to call on your company for deliveries on a much decreased scale due to the operating changes of your company since allotment was first made, assurance of which is again repeated. It is considered unnecessary that any change be made in the technical reading of the Navy order, which should therefore be promptly signed by you and returned here, in order that payments now pending can be made without delay.

Respectfully,

——— ———,
Paymaster General of the Navy.

VIII. During the period involved in this action the Navy Department of the United States maintained a list of mines known and designated as the "Navy acceptable list." This list contained the names and locations of all mines, the production of which had been inspected and tested by the Navy Department and had been found to be up to the Navy standard and fit for use by the Navy Department. All the coal involved in this action was taken from mines on the "Navy acceptable list."

IX. Pursuant to the orders described in these findings plaintiff delivered coal to the United States and received payment therefor as follows:

	Tonnage	Paid
Navy Order N–77. At Tiburon, Cal., June, 1917, to Sept., 1917	11, 889. 1840	$28, 282. 47
Navy Order N–77 supplementary:		
At Lamberts Point, Va., Oct. 2, 1917, June 30, 1918	106, 332. 1640	466, 152. 26
At U. S. Naval Hospital, Portsmouth, Va., Oct. 31, 1917, June 30, 1918	4, 110. 2000	18, 049. 29
At Tiburon, Cal., Oct., 1917, Jan., 1918	12, 954. 1240	36, 140. 43

Navy Order N-3004:	Tonnage	Paid
At Lamberts Point, Va., July 1, 1918, June 7, 1919	126,952. 190	$607,148.30
At U. S. Naval Hospital, Portsmouth, Va., July 1, 1918, June 30, 1919	4,855. 200	23,504.84
At Sewalls Point, Va., Oct., 1918, Dec., 1918	3,097.	14,618.92
Total	270,192. 390	1,193,896.51

On August 21, 1917, the President of the United States, under the so-called "Lever Act" of August 10, 1917 (40 Stat. 276), issued a proclamation regulating the sale of coal between private parties and prescribing a scale of tentative prices for the sale of bituminous coal. The scale of prices was provisional only, subject to reconsideration and revision when the whole matter of administering the fuel supply of the country should have been satisfactorily organized and put in operation. The price thus prescribed for the run-of-mine Virginia and West Virginia coal, which covered the plaintiff's coal, was $2.00 per net ton, f. o. b. mines, which was equivalent to $2.24 per gross ton. By Executive order, dated August 23, 1917, that price was increased by permitting to be added thereto a jobber's commission of 15¢ a net ton, which is equivalent to 16.8¢ a gross ton, making the unit price $2.408 per ton. In order to obtain that price the plaintiff submitted an affidavit to the Navy Department, dated October 19, 1917, that it was a coal jobber engaged as a sales agent in the business of selling coal from mines located in the Pocahontas coal field in West Virginia.

The scale of prices specified in the Executive order of August 21, 1917, was amended by Executive order dated October 27, 1917, by adding thereto the sum of 45¢ a net ton, or 50.4¢ a gross ton to cover wage increases. The Navy Department sent a copy to the plaintiff of a circular letter dated November 12, 1917, addressed to "All Suppliers of Bituminous Coal," advising it of the issue of said Executive order and requesting it to submit an affidavit to the effect that the mines it represented had fully complied with the conditions stipulated in the order of the President, as quoted in the letter, and further requesting that the affidavit state specifically the date on which the wage increase became effec-

tive. By letter dated November 26, 1917, the plaintiff submitted the required affidavit, dated November 26, 1917, covering the wage increase.

In the Fuel Administrator's Publication No. 4–C, entitled "Further classification of bituminous coal," an increase of 40¢ a net ton, or 44.8¢ a gross ton on coal furnished from the Tug River district was granted. The order of the Fuel Administrator, dated March 20, 1918, increased the price of specially prepared coal by 20¢ a net ton, or 22.4¢ a gross ton. On March 31, 1918, the jobber's commission of 15¢ a net ton, or 16.8¢ a gross ton, was discontinued. The provisional prices fixed in the Executive order of August 21, 1917, were made the final prices for coal delivered during the period by Fuel Administrator order dated March 27, 1918, which stated that these prices should be the basis for settlements on coal sold prior to April 1, 1918; and that after April 1, 1918, no coal should be sold or delivered at any fixed price subject to revision on account of any subsequent price regulations. The Fuel Administrator Order No. 26, effective May 25, 1918, decreased the price of bituminous coal, including the mines from which shipments were made by the plaintiff to the Navy Department, by 10¢ a net ton, or 11.2¢ a gross ton. Under date of November 22, 1918, the Paymaster General of the Navy addressed to the plaintiff a letter, which granted an increase of 5.6¢ per gross ton on specially prepared coal shipped from the mines from which coal was being furnished by the Atwater Company to the Navy.

The detailed figures showing dates and payments are shown by plaintiff's amended Exhibits A, B, C, and D, filed with the second amended petition, which to this extent are made a part hereof.

The payments made to the plaintiff by the Navy Department were for the entire tonnage furnished by the plaintiff at the full prices mentioned in the specified orders and their modifications. These payments were received, accepted, and retained by the plaintiff without protest.

For each payment vouchers were prepared by officers at the Navy Department on printed forms of public bills. On each form appeared the words "Bureau Contract No.,"

which had been stricken out and the words "Navy Order N-3004" (or the appropriate number) inserted by the Navy Department. Attached to each bill was an invoice on the letterhead of William C. Atwater & Company, Inc., on which appeared the endorsement "Correct and just. Payment not received. William C. Atwater & Co., Inc., by David H. Allen, General Manager." This endorsement appeared on the invoices presented under Navy Order N-77, as well as under Navy Orders N-77 Supplementary and N-3004. Such an endorsement was in practice required by the Navy Department when tentative prices were paid under Navy Department orders providing for advance payments, and without such an endorsement the supplier would not be paid, but payments under bills bearing such endorsement were not treated as final by the Navy Department, and additional payments would be made where the Navy orders so provided in spite of such an endorsement on the invoices at the time of the payment of the advance price.

On August 31, 1917, the supply officer, U. S. navy yard, Norfolk, Va., had sent a circular letter to the plaintiff on the subject of supporting papers covering deliveries of coal to the Navy which contained instructions in part as follows:

"5. For each delivery under this award, submit bill in duplicate for the exact quantity shipped, stating thereon the requisition or contract number and item number. The original bill must bear the following certificate and be signed with firm name and autograph signature of an official of the firm, together with this title:

"Examples:

"'Certified correct and just; payment not received.

"'THE SMITH JONES COMPANY,

"'By J. D. SMITH, *Secretary*.

"'Certified correct and just; payment not received.

"'JONES & SMITH,

"'By J. D. SMITH, *Member of Firm*.'

"6. The Treasury Department regulations require the certification as outlined in the above paragraph. You are requested, therefore, to follow carefully these instructions, in order that there may be no delay in our making prompt payment of your bill."

The Fuel Administrator changed from time to time the prices specified in Navy Orders N-77, Supplementary N-77,

and N–3004, by orders duly issued and received by the plaintiff, and the plaintiff received, accepted, and retained the payments made to it at the prices as so changed from time to time by proper governmental authority without protest. The provisional price specified in Navy Order N–77 was made the final price for the coal delivered under its terms and provisions by the Fuel Administrator's order dated March 27, 1918.

X. The plaintiff owned no coal mines. The coal delivered to the United States involved in this case was acquired by plaintiff by purchases from mines controlled by interests affiliated with them. On the dates when the three Navy orders were given the coal which was subsequently delivered pursuant to said orders was in the ground and was not owned by the plaintiff. In every case the coal was owned by plaintiff at the time of actual delivery to the United States. The coal was delivered to the United States pursuant to instructions received from the Navy Department from time to time, sometimes in letters, sometimes telegrams or telephone calls, sometimes by instructions direct to the railroad to turn the coal over to vessels. These instructions were in addition to Navy Orders N–77, N–77 Supplementary, and N–3004. The coal delivered to Lamberts Point and to Sewalls Point had in all cases been mined and was owned by the plaintiff when these instructions were given. But in the case of the coal which was delivered to Portsmouth, Virginia, and Tiburon, California, the orders were monthly and some of the coal was not out of the ground when the orders were given. All of the coal was shipped on commercial waybills, which are simplified bills of lading. None of it was shipped on Government bills of lading. The coal which went to Lamberts Point and Sewalls Point was consigned to William C. Atwater & Company, Inc., and was delivered by the plaintiff to naval vessels at Hampton Roads. The coal which went to the Naval Hospital, Portsmouth, Virginia, and to Tiburon, California, was consigned to the officer in charge at the respective places.

XI. During the whole of the period in which the said coal was delivered there was a ready and constant market at Hampton Roads, Virginia, for said coal for export to

foreign countries and for foreign bunkering purposes, and the demand would have readily absorbed all of the coal delivered by plaintiff to the Navy Department of the United States. The plaintiff company had a well-established export business in coal similar to that furnished the Navy. There was direct railroad connection between the mines in West Virginia where the coal was produced and the piers at Hampton Roads, Virginia, where the export market existed. There was no lack of cars or embargo during the period in question which would have prevented the coal going into the export market. The coal delivered at Lamberts Point, Virginia, and Sewalls Point, Virginia, did in fact go over the railroad to the point of export market at Hampton Roads. The coal delivered to the United States Naval Hospital, Portsmouth, Virginia, went over the same railroad to a switching point a few miles from Lamberts Point and could readily have gone to Lamberts Point. During the period that the coal was delivered to Tiburon, California, the railroad was open to Hampton Roads, Virginia, and the plaintiff company was shipping large quantities of coal to Hampton Roads during the same period.

XII. At the time of these transactions the price of export coal was in excess of the price of domestic coal. The export market value of the coal delivered to the Navy Department at the time and place of delivery of the same, the amounts which the Government has paid to plaintiff, and the difference therein are as follows:

	Export market value	Paid	Difference
Under Navy Order N-77	$59,499.11	$28,282.47	$31,166.64
Under Navy Order N-77, supplementary:			
For coal delivered prior to Feb. 23, 1918	329,150.62	227,958.79	101,191.83
For coal delivered Feb. 23, 1918, and thereafter	389,270.20	292,383.19	96,887.01
Under Navy Order N-3004	754,017.15	645,272.06	108,745.09

Total market value $1,531,887.08
Total paid 1,193,896.51
Total difference 337,990.57

XIII. The market value as stated in Finding XI hereof is in all cases within the figure allowed by the Fuel Administration for sale for export and foreign bunkering. The

Fuel Administrator promulgated orders relating to export and bunker coal as follows: On September 6, 1917, it was directed that the President's order fixing prices for bituminous coal as of August 21, 1917, included export and bunker coal. This was repeated in another order of the Fuel Administrator of October 6, 1917. There was considerable difference of opinion among coal operators as to whether this meant that the price of export coal was to be no more than the domestic price, and on December 13, 1917, the Fuel Administrator directed that the maximum price of coal sold and delivered to vessels for foreign bunkering purposes or for export to foreign countries, except to Canada and Mexico, should be the price prescribed for such coal at the mine at the time such coal left the mine plus transportation charges from the mine to port of loading plus $1.35 per ton of 2,000 pounds, plus customary and proper charges for work on bunkering or loading, storage, towing, elevation, trimming, special unloading, and other port charges. On February 25, 1918, this order was reaffirmed and it was stated that the phrase "delivered to vessels for foreign bunkering purposes" was held to mean coal put in the bunkers of any vessels sailing from a tidewater port to any port outside the United States and Alaska excepting naval vessels or Army transports. On January 31, 1919, the regulation of price for export coal was rescinded. No permits were required from the Fuel Administration for the sale of coal for export and foreign bunkering, and there was no restriction of such sale by the Fuel Administration except as to price. The War Trade Board required permits in connection with the sale of coal for export purposes, but these permits were refused only in cases when the proposed consignee had been blacklisted as being friendly to the enemy. Plaintiff herein never had an application refused and experienced no difficulty in connection with its sales for export purposes. The War Trade Board exercised no supervision over the delivery of bunker coal to foreign vessels.

XIV. During the period from June 1, 1917, to date, the legal rate of interest in Virginia, West Virginia, the District

of Columbia, and New York was six per cent and in California was seven per cent.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This suit grows out of several orders issued by the Navy Department to the plaintiff for the purchase and procurement of coal. The orders were accepted, the coal delivered, and the plaintiff paid in full the price fixed in the orders. It is here claiming that its coal was requisitioned, and that it is entitled to the full market value of the same at export prices.

The plaintiff, at the time it received and accepted the orders, was engaged in business as a sales agent, purchasing the output of the mines of others and reselling to coal dealers and consumers without physically handling the coal. It, at the said time, owned no coal on the ground or at the mouth of the mine, nor did it own any mines. All the coal delivered was purchased by the plaintiff, and at the time of delivery was owned by the plaintiff.

At the time of the receipt of the orders the entire tonnage of coal which the plaintiff had previously contracted for had been disposed of under contracts in advance, and until some months thereafter.

On June 14, 1917, and thereafter plaintiff received orders at different times from the Navy Department for specified amounts of coal subject to the conditions in subparagraph (a) of said orders.

Subparagraph (a) is as follows:

"The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order."

The orders fixed a price per ton, and stated that this price had been determined " as reasonable and just compensation " for the coal to be delivered; that " if payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order "; and that if the price stated was satisfactory the following clause at the bottom of the order should be signed:

" The above order is accepted subject to the conditions in subparagraph (a). The price therein stated and fixed as being reasonable is satisfactory."

This was signed in each case by the plaintiff.

The order also provided that in case the price fixed as reasonable was not satisfactory, 75 per cent of this price would be paid to the plaintiff. The orders stated that they were issued pursuant to the provisions of the acts of March 4, 1917, and June 15, 1917.

The plaintiff accepted the price named and payment in full, without protest or objection, for all coal delivered at the price stated in the respective orders, which was the domestic price.

In the case of the *American Smelting & Refining Co.*, 259 U. S. 75, 78, 79, it was held that an order for copper at a price fixed, and the acceptance of the order and the price fixed, was a contract, which precluded the vendor from recovering additional compensation. Justice Holmes, in delivering the opinion of the court, said:

" * * * the petition is framed on the theory that there was no contract, but a requisition under the above-mentioned act of June 3, 1916, c. 134, sec. 120, and that the claimant is entitled to just compensation by that section and by the fifth amendment to the Constitution. This we hold to be a mistake.

* * * * *

" But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered."

In *Nelson Co.* v. *United States*, 56 C. Cls. 448, there was an order for the delivery of lumber in excess of the amount called for by the contract, the price stated in the order being the contract price, and, although protesting, plaintiff filled

the order and accepted payment. This court dismissed the petition. Chief Justice Taft, in delivering the opinion affirming this court (261 U. S. 17, 23, 24), said:

"* * * this can not change the legal effect of its evident acquiescence seen in its letter of June 18th and its failure to protest thereafter and to put the Government on notice that it intended to claim a recovery on a *quantum valebat* when it was delivering the extra two million feet of lumber and receiving the payments therefor from the Government at the prices named in the bid."

In the case of *Willard, Sutherland & Co.* v. *United States*, 262 U. S. 489, 494, where there was an order for coal in excess of the quantity provided for in the contract, the price fixed in the order being the contract price, and the plaintiff protesting filled the order and accepted payment, the judgment of this court dismissing the petition was affirmed. Justice Butler, in delivering the opinion of the court, said:

"* * * it must be held voluntarily to have accepted the order for the additional 1,000 tons and to have furnished it at the price specified in the contract. *Charles Nelson Co.* v. *United States*, 261 U. S. 17."

At the time of the passage of the act of March 4, 1917, this Government was not at war, but was preparing for any emergency that might arise, and was at war at the time of the passage of the act of June 15, 1917. The required method of advertising for bids and executing formal contracts necessarily involved delay. It was thought desirable to supplement this by another and a swifter method of purchasing and procuring supplies, and so a method was provided by these acts in addition to the methods authorized by sections 3709 and 3744 of the Revised Statutes. The President by these acts was authorized, "in addition to the then authorized methods of purchase and procurement," "to place an order" for materials with producers of such materials through such agencies of the Government as he saw fit; and in order to be sure that the desired materials would be promptly secured, and possibly as an incentive to acceptance and compliance with the order, it was further provided that, if the producer refused or failed to comply with the order, the President could seize the materials or plant of the

producer. A taking was only to be resorted to in case of the failure or refusal of the party to accept or comply with the order.

As stated, the President could proceed to purchase by simply placing an order. But, further, it will be seen that it was contemplated that in placing the order he should name a price, and so the act provides that if the producer to whom the order is given shall "refuse to furnish * * * at a reasonable price to be determined," the President is authorized "to take possession of his plant or materials." The term "reasonable price" left the matter of purchase price to be offered discretionary with the President, as well as the terms and conditions upon which the goods were to be supplied, as also the form and substance of the order to be issued in each case.

Obviously, when an order was given under authority of these statutes for the purchase of materials, and the terms and price were fixed therein, and the price was accepted, or the order complied with and materials delivered without formal acceptance, there came into existence a valid contract under the authority of this statute, a contract which was enforceable in the courts and binding upon both parties.

These said two acts, in some minor particulars not pertinent to the question here, are different, but the authority of the President to make a legal contract by placing an order under certain terms and conditions without the formality of advertising for bids or formal contracts is the same, as is the purpose to secure by this method the purchase by contract of the materials and to make the acceptance of the order and the delivery of the goods, where no objection has been made to the price, a contract binding upon both parties.

As stated, the orders in this case fixed the price. It was accepted in writing as satisfactory, and the price named was paid and accepted.

The court in the *Consolidation Coal Co. case*, 60 C. Cls. 608, 270 U. S. 664, which was appealed to the Supreme Court and the appeal dismissed, and in the *Pocahontas Fuel Co. case*, 61 C. Cls. 231, where no appeal was taken, and in both of which the parties owned coal mines, held that similar orders to those in this case constituted contracts. In *Ameri-*

can Smelting Co. v. *United States*, *supra*, Justice Holmes stated in the opinion:

"No acceptance was necessary if the order was a compulsory requisition"—that is to say, if it be merely an order intended to be accepted by the plaintiff, its acceptance or nonacceptance could not convert it into a requisition. If any significance is to be attached to the acceptance by the plaintiff of the order and price as satisfactory, it must be concluded that it did not regard it as a requisition, and it is evident that this was not the intention of the defendant.

As was stated in the *American Smelting & Refining Co. case* "if it desired to stand upon its legal rights, it should have saved the question of the price. It did not do so, but, on the contrary, so far as appears, was willing to contract and was content in the main with what was offered." Following what we concluded was the legal principle and logic of this opinion, which was in accord with our construction of the meaning of the statutes, we held, as stated, in the *Consolidation Coal Co.* and *Pocahontas Fuel Co. cases*, *supra*, that the orders were contracts. And in line with the same principles we held in the *Liggett & Myers case*, 61 C. Cls. 693, 274 U. S. 215, which involved an order for cigarettes, that it was a contract, but the Supreme Court reversed that case, holding that the order was a requisition, though not questioning the jurisdiction of this court. A few facts will serve to distinguish it from this case. That case was on a stipulation of facts, which did not contain the President's order of August 9, 1917, giving authority to the Secretary of the Navy to proceed in the procurement of materials. It will be found in Finding V in this case, and an inspection of it makes it plain that it is important in reaching a conclusion as to whether the orders under subparagraph (a) of the naval orders were, under the acts of March 4, 1917, and June 15, 1917, contracts or requisitions.

The order of the President is based upon and confined to the authority given him under these acts and contains the following language:

"I hereby direct that the Secretary of the Navy shall have and exercise all the power and authority vested in him in said acts in so far as applicable to and in furtherance of the

production, purchase, and requisitioning of * * * war materials, equipment, and munitions required for the use of the Navy and the more economical and expeditious delivery thereof."

The power conferred upon the Secretary of the Navy by the order of the President was only such power as was given him under the acts of March 4 and June 15, 1917 (*Hooe case*, 218 U. S. 322, and *North American Co. case*, 253 U. S. 330, 333), and the power given him under these acts was to place orders, and, on refusal to accept or comply with them, to seize the materials and operate the plant of the producer.

In the *Liggett & Myers case* the order was under subparagraph (b) of the naval order, which did not fix a definite price, but left for later determination the compensation; that is to say, that under subparagraph (b) the plaintiff's consent to the price fixed was not sought as it was under subparagraph (a). The court says in its opinion:

"The plaintiff's consent was not sought. It was not consulted as to quantity, price, time, or place of delivery."

In the instant case, under subparagraph (a), the consent of the plaintiff was sought. It was asked to state whether or not the price fixed was satisfactory, and it did so state in signing its acceptance of the order. The acceptance of the order "subject to the conditions" was an acceptance of the quantity named and the time and place of delivery. The plaintiff could have refused to accept, and in that event it would receive 75% of the price. The acceptance of the price, which included an agreement to the other terms of the order, can not be said to have been a mere "expression of purpose to obey," for there was no compulsion in the acceptance. Plaintiff had no coal mines. It had nothing to be seized if it did not accept the orders when and as given.

Subparagraph (a), under which the orders in the present case were placed, and subparagraph (b), under which the orders in the *Liggett & Myers case* were placed, are in the findings.

One other distinction between this case and the *Liggett & Myers case*, assuming for the purpose that orders under subparagraph (a) were intended as requisitions to be enforced

if not complied with, under the acts of March and June, 1917, is that in that case the plaintiff owned a plant, and was engaged in the manufacture of cigarettes. Had it refused to accept the order the Government could have seized its plant. In this case the plaintiff was a mere broker and sales agent, securing coal for sale when and as it could obtain it, from mines and independent operators. There was nothing obligatory upon the plaintiff, no compulsion. There was nothing the Government could have seized under said acts (and the act of June 3, 1916, did not apply) had the plaintiff refused to comply with the orders. Clearly it could not have been the intention of the Navy Department to treat this order as a requisition.

There is another phase of the provisions of the act which precludes the contention that this was a requisition. The act provides for an order for war material "which is of the nature and kind usually produced or capable of being produced by such individual"—that is, the person to whom the order is given. This means, if it means anything, that the materials ordered must be of the kind which the person addressed manufactures and produces; that is to say, the act did not authorize the President to order cigarettes from a producer of coal, or coal from a manufacturer of cigarettes. So his power was limited to the material produced. The word "produced" here means manufactured, something brought into existence by some plan or method of transforming materials into a product.

The petition alleges that the plaintiff's coal was requisitioned by the Government under certain orders issued by the Navy Department. There are three orders involved, one dated June 14, 1917, later becoming Navy Order N-77, one called Supplementary Navy Order N-77, dated September 22, 1917, and one called Navy Order N-3004, dated June 13, 1918. The deliveries under the first two of these orders were completed on or before June 29, 1918. Deliveries under the last order begun July 2, 1918, were made at divers dates, and completed in June, 1919. The plaintiff claims that its coal was taken under the power of eminent domain and that it is entitled to have the highest market value of coal at the time and place of delivery. It has been paid the full price stated

in the several orders except where the prices were increased from time to time by the Fuel Administration, and in the latter case the full prices have been paid and have been received. In other words, the prices for domestic coal have been paid. The plaintiff asks export prices.

Whether there was authority in the officers issuing the orders to exercise the power of eminent domain, and whether having received the entire price fixed there should be a recovery of an additional amount, and whether, in the absence of action by the President, or the board authorized to do so, ascertaining the amount of just compensation, there is a right of action, are questions that were involved in the case of *New River Collieries Co.*, decided by this court on April 2, 1928 (*ante*, p. 205), and the discussion need not be repeated in this case, which is weaker, in some aspects, than was the case just mentioned.

Plaintiff waited more than six years after it had accepted the order, as stated, before this suit was brought on February 23, 1924, and it waited more than six years after it had delivered more than 40,000 tons of the coal called for before bringing suit. The entire amount called for was delivered five years and eight months before this suit was instituted. The acceptance of the order, the expression of satisfaction with the price, the acceptance of the entire amount based on that price, conclusively bar the present claim. But the plaintiff insists that subparagraph (a) was modified and a refinement is indulged in as to the meaning to be ascribed to the modification. It accepted, however, the price stated in subparagraph (a) and was actually paid that price. If there had been a reduction of the price and the reduced sum had been offered there would be more merit in the contention. There can be no merit in it when so belatedly asserted. As heretofore explained, no such case as here presented was considered in the *Liggett & Myers Tobacco Co. case*, 274 U. S. 215, 61 C. Cls. 693.

Navy order N–3004 covered the period from July 1, 1918, to June 30, 1919, and it was accepted with a statement that "the price fixed is satisfactory." The full amount was paid to and accepted by plaintiff, but the latter claims that sub-

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paragraph (a) was modified. The modification did not alter the effect to be given the acceptance of the price fixed as satisfactory, whatever may have been the effect of an attempted reduction of the price stated. The acceptance of the full amount of the stated price—that is to say, the acceptance of 100 per cent instead of 75 per cent—has an important bearing on the right of the recipient to maintain a suit for an additional sum, and in any event will defeat such right, whereas in this case the price was agreed to, was accepted without protest, and no complaint was made for so long a time as the record discloses. The mere acceptance of the 100 per cent is not sufficient to defeat the jurisdiction of a court. *Houston Coal Co. case*, 262 U. S. 361. But such acceptance does affect the merits of the case. *McNeil & Sons case*, 267 U. S. 302, and *White Oak Coal Co.* v. *United States*, 15 Fed. (2d) 474. In this last-named case the court says (p. 477):

"Under the law, as well as under the offer of the Government, plaintiff was entitled to the full amount of the price fixed, only in the event it was accepted in full satisfaction. It had the right to decline the Government's offer and sue for the value of the property taken, if it desired to do so, but in that event it was entitled, not to the full amount of the price fixed, but only 75 per cent thereof. It obtained the full price by accepting the offer, certifying the price fixed as satisfactory, and rendering invoices, not for 75 per cent, but for the full price, which it accepted without protest. Even if the contract feature of the case be ignored, plaintiff can not recover. It voluntarily elected to pursue one of two inconsistent remedies as a means of obtaining compensation for its property. Having obtained benefits thereby which it could not otherwise have obtained, it is estopped from pursuing the other remedy."

There could be no requisition or taking of the coal except by virtue of the orders. There is not a particle of proof of any authority in any officer or agent of the Government to take plaintiff's coal, if we leave out of consideration the three orders and the acts on which they were predicated. Affirmative proof of the power to take must appear. See *Hooe case*, 218 U. S. 322, 336; *North American Co. case*, 253 U. S. 330, 333. If, on the other hand, there was a taking

under the statutes mentioned in the orders, then it is plain that plaintiff has not followed these statutes in the assertion of its claims. It has not only departed from their provisions in its acceptance of 100 per cent of the prices stated, but it concedes that no other action has been taken by the President or other authorized agency toward determining the just compensation which the acts recognize. If it be said the price was determined in the orders themselves, the answer is that that price was declared satisfactory by the plaintiff and received in full. If something more was necessary to be done by the President or other agency, it has not been done, nor has plaintiff asked that such action be taken. It has acquiesced for years. It asserts in its brief that "when its property was taken it did not have the immediate right to go to the Court of Claims," and must first have just compensation determined by the President, citing *United States* v. *Taylor*, 104 U. S. 216, *United States* v. *Cooper*, 120 U. S. 124. We think that a substantial compliance with the procedure provided in the statutes is essential in such case. But under another phase of the case plaintiff asserts that it "was not entitled to sue until May 14, 1922." This date is apparently adopted as the date when the President's power expired under the act of June 15, 1917. This assertion is predicated on the provision of the act, 40 Stat. 183, terminating authority under it at the end of six months after the final treaty of peace. But the act of June 5, 1920, 41 Stat. 988, expressly repealed the act of June 15, 1917, subject to certain exceptions, one of which was that it conferred on the United States Shipping Board, instead of the President, the "powers and duties relating to the determination and payment of just compensation." If, therefore, it be true, and plaintiff apparently concedes it is true, that action by the President under the statutes was a condition precedent to its right of action, the statute continued that same power in a board which has not acted and has not been applied to for action, and because thereof there is still a bar to the suit. The plaintiff insists that no part of its claim is barred by the six-year statute of limitations, notwithstanding the first order was issued in 1917 and entirely complied with by de-

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liveries more than six years before suit was brought, which was in February, 1924, and the second order was issued and very largely complied with more than six years before suit was brought, and assigns as the reason for this contention that the necessary action by the President toward determining compensation had not been taken. If the reasoning is good to prevent the running of the statute of limitations, it is equally potent to prevent a suit.

Our conclusions may be summarized as follows:

1. That there was a contract; that plaintiff was paid the contract price and can not recover more than that price;

2. If these orders are treated as requisitions, then—

(a) That the plaintiff was not a producer of coal, owned no plant or mine, possessed no available coal at the time of the receipt of the orders, and was not a person to whom the requisition could or would be issued by the Secretary of the Navy under the authority of the acts named in the order, or the order of the President under said acts.

(b) That the acts enjoin certain necessary procedure, and that if the orders were obligatory upon it, the plaintiff has not pursued the course required by said acts and can not avail itself of them in this proceeding. See *New River Collieries Co.* v. *United States*, decided by this court April 2, 1928, *ante*, p. 205.

(c) That the claim is barred by the statute of limitations, and

(d) That the court is without jurisdiction. If the material was appropriated for public use, the taking must have been under section 10 of the Lever Act. *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *United States Bedding Co.* v. *United States*, 266 U. S. 491, 493; *Atwater Co.* v. *United States*, 275 U. S. 188, 191; *White Oak Coal Co.* v. *United States*, 15 Fed. (2d) 474 (certiorari refused).

The petition should be dismissed, and it is so ordered.

Green, *Judge;* Moss, *Judge;* and Booth, *Chief Justice*, concur.

Reporter's Statement of the Case

SHOFSTALL HAY & GRAIN CO. v. THE UNITED STATES

[No. B-120. Decided May 28, 1928]

On the Proofs

Contracts; general agreement; verbal purchases confirmed by formal orders; breach.—See *Miller et al.* v. *United States*, *ante*, p. 506.

The Reporter's statement of the case:

Mr. Robert T. Scott for the plaintiff. *Messrs. Frank Davis, jr.*, and *William D. Harris* were on the brief.

Messrs. John E. Hoover and *Charles F. Kincheloe*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. McClure Kelley* was on the brief.

The court made special findings of fact, as follows:

I. The Shofstall Hay & Grain Company, plaintiff herein, is a corporation organized and existing under the laws of the State of Missouri, and engaged in the business of buying and selling hay, straw, oats, and other forage, with its principal office and place of business at Kansas City, Missouri.

II. In June, 1917, the Government of the United States, as a necessary incident to its participation in the World War, began to establish a large number of training camps throughout the United States, principally in the West and Southwest. Thousands of horses and mules were required at these camps, with the resultant necessity of large purchases of hay, straw, oats, and other forage for quick delivery. The entry of the Government into the forage market forced the price of forage to an unreasonable level. The ordinary methods of purchasing forage became impracticable, resulting in inadequate supplies of forage at some camps and congestion at others.

Conferences were held between the duly authorized officers of the Quartermaster's Department of the United States Army and many of the hay and forage dealers. At these conferences the Government officials solicited the assistance

of the hay dealers to keep the price of hay and forage from rising beyond a reasonable figure and at the same time to secure prompt deliveries of adequate amounts of forage wherever required. It was apparent that the Government's method of advertising for bids for a large quantity of forage for delivery over a long period of time would necessarily force the market to a point deemed unreasonable. No contractor could assume the risk of contracting subject to Government inspection and rejection at destination for distant future delivery at a fixed price, when there was no means by which the market could be controlled.

Under Army regulations in force at that time all commodities were required to be bought on competitive bids, but the regulations provided that if the competitive bids were not satisfactory they could be rejected and in emergency cases purchases could be made on the open market. Under the existing emergency the Government adopted the plan of advertising for bids for hay, straw, and other forage, and such bids as were made at prices considered fair and reasonable were accepted. Where the prices were unreasonable the bids were rejected and the Government went on the open market and made emergency purchases.

As a result of the conferences held between the representatives of the Government and the representatives of the hay and forage dealers it was understood and agreed by and between the Government representatives and the hay dealers, including plaintiff, that the method theretofore followed by the Quartermaster's Department of purchasing hay by formal advertisement and proposal would be discontinued and that the purchase of forage would be handled on a commercial basis and according to the rules and custom of the trade which had been established between commercial buyers and sellers of hay and other forage; that the Quartermaster Corps would wire or telephone for quotations when hay was needed and would accept same verbally over the telephone or by wire and would designate the destination and would confirm the order by formal purchase order; that the Government would have the hay graded at destination by competent inspectors, according to the rules of the National Hay

Association, the Government to furnish suitable cars at the point of origin for the transportation of said hay and forage, to give shipping instructions at the time orders were given, and to instruct the receiving railroad to place cars for the particular contract.

The rules and customs of the commercial trade, in so far as they apply to this case, are as follows:

"The inspection is to be made by competent and able inspectors, in accordance with the rules of grading existing in the trade, which are the same as the rules of the National Hay Dealers Association.

"The inspection shall be made on the day the car of hay arrives at destination.

"If rejection is made the contractor shall be immediately notified, as claims on account of rejection must be made to the original seller within thirty days from the date of sale and within ten days after rejection. Information must be given in the notice of rejection by the person rejecting the hay to enable the contractor and the original seller to determine the reasons therefor.

"Partial rejections are not allowed, unless the consent of the shipper has been first secured. The cars must be accepted or rejected in their entirety.

"The regrading of hay to a grade lower than that called for in the contract, or the repricing of hay at a price lower than that called for in the contract, is not allowed by commercial custom, unless the consent of the buyer has been first secured.

"Under commercial custom the actual weight of the hay in the car is controlling. If the consignee claims a lesser weight than that claimed by the consignor, he must support his claim by a certified scale certificate. This certificate must be sent to the shipper within five days after unloading the car, in order that he may make claim against the person from whom he purchased the hay. The time fixed by commercial practice for making such claim is thirty days.

"Railroad weights are not accepted as accurate in commercial practice. Unless the hay is actually weighed as above described and evidence thereof given to the shipper, a certified invoice, scale ticket, or weight certificate of the person actually weighing the hay when shipped is conclusive on the parties.

"Under commercial practice all demurrage accruing against the cars being held for inspection, even though the cars are afterwards rejected, is paid by the consignee.

"Under commercial custom cars reconsigned by the consignee after receipt at the original destination to another destination are deemed to be accepted by him."

After the adoption of this plan the Quartermaster Corps advertised that it would buy hay from any person in quantities of five cars or more. All the hay and forage dealers with whom the department proposed to do business, including plaintiff, were informed that this would be the method used by the Quartermaster Department in its future dealings with them, and the plan was embodied in a circular sent by mail to the different hay dealers. This plan or proposal was personally communicated by Major Albert B. Warren, the officer in charge of the buying of hay and grain for the forage branch of the Army, to representatives of plaintiff, and was agreed to by both parties as the basis on which they would transact business in the future.

In order to carry out this plan it became necessary for plaintiff and the other hay dealers doing business with the Government to make bids on quantity requirements for the various camps. When a contractor was called upon for a bid or submitted a bid and it was accepted, it was later reduced by the Government to writing in the form of a letter of acceptance or in the form of a purchase order, containing order number, date, shipper's name and address, grade and quality of the forage desired, the quantity, price per ton, schedule of delivery, and shipping directions. These letters of acceptance and purchase orders were supplemental to the verbal agreement originally entered into. In some cases the offer was oral and confirmed by written order. In other cases both offer and acceptance were written, and in still others the bid was written and was accepted on its face by the proper officer of the Government. There were frequent delays between the time of placing the order and the issuance of the written form; sometimes the hay would be in transit before the purchase order was received, and at other times a blank order would be issued, leaving the amount and price blank.

By the terms of the oral agreement all orders were to cover periods of thirty or sixty days, not over sixty days, for the time of completion, and the Government was to pay

80% of the invoice when it was attached to sight draft with bill of lading, and the balance of 20% was to be paid promptly on the inspection, weighing, and unloading of the hay at destination, not to exceed thirty days from the time of shipment. In many cases the Government fell behind in both its 20% and 80% payments. Sometimes the Government was behind as much as sixty days on its 80% payments and often many months on the 20% payments.

During the period that the hay in question was being shipped the majority of the cars furnished by the Government for the shipment of hay and forage were in poor condition, having leaky roofs and doors. As a result of the condition of the cars some of the hay was damaged in shipment. Under commercial custom where the contents of a car are found damaged by reason of the condition of the car, the buyer is required to immediately notify seller, so that the seller can notify the railroad company. The railroad company requires that it be given an opportunity to verify statements as to the defectiveness of the car. The buyer must support the statement of damage as to the contents of the car by affidavit, and claims for damage on account of the condition of the car must be made within six months after the arrival of the car at its destination. The Government did not always report the condition of the cars to the contractor, and as a result of this failure the contractor was prevented from making a claim to the railroad company within the period required.

III. Prior to February, 1918, officers and enlisted men were detailed to inspect and grade hay. Many of these men had had no previous experience or training in the hay business. Serious complaints of incompetency and inefficiency were frequently made by the sellers. In February, 1918, George S. Bridge was appointed chief of the forage branch of the United States Army and remained in that position until the latter part of 1918. For the purpose of securing competent hay and forage inspectors Mr. Bridge established a school at Chicago where they were to be tested. Many of the men who were assigned to the forage division were unfamiliar with hay and forage. Very few of them had had

any experience in inspecting hay and forage, but some of them were reared on farms and had a limited knowledge of the kind of forage produced in their respective localities. Most of the men were sent to the school at Chicago to be instructed. While in Chicago they were given limited instructions by a competent hay inspector and were sent down on the tracks where hay and forage were being unloaded and watched the inspectors perform their duties. Many of these men were not in Chicago more than two or three days and but few of them were there for a period as long as a week.

The greater part of the hay on which the applicants were tested in Chicago was timothy hay, while the Government bought, and the inspectors were frequently called upon to inspect, alfalfa, prairie, redtop, and other kinds and grades of hay. Some of the men examined in Chicago and found to be the best fitted for inspectors were afterwards put on other duties. The inspectors were transferred to different camps. As a general rule, men from the western country were put in eastern camps and men from the eastern country were put in western camps. As a result, inspectors familiar with one kind of hay were sometimes sent to camps where the Government received grades and kinds with which they were not familiar. On account of the constant movement of troops there was a continuous changing of inspectors. Many of the inspectors were incompetent, and as a result of the incompetency many mistakes were made.

At times there was a great congestion of hay at some of the camps, and when hay was not needed many cars were rejected that were up to grade and in accordance with the specifications. On the other hand, when a camp was in need of hay it frequently occurred that inferior grades of hay were passed by the inspectors and accepted by the Government.

At times cars were accepted by one Government inspector, forwarded to a different camp, and there rejected by another Government inspector. In some cases where cars were rejected the shipper was able to get reinspection and the hay would be accepted. In a number of cases cars of hay were rejected at camps, moved into terminal markets, and sold

to commercial concerns either on the grade originally sold to the Government or a higher grade.

The Government very seldom gave the contractor reason for rejection, except that it was not up to grade or sometimes was unfit for use, which reasons, under commercial custom, were not comprehensive enough to enable the contractor to make a claim against the seller. At times inspection slips and other necessary data were sent in very late and sometimes were never sent to the Chicago office; consequently the contractor received no notice of rejection or repricing and regrading of the cars. Frequently the contractor would not be notified of the regrading, repricing, or the rejection of hay until many months had elapsed. In the meantime he had made the final settlement with the shipper and would have no recourse against him.

On account of the isolated location of the camps to which hay was shipped there was seldom any central hay market to which the rejected hay could be sent. It had to be shipped to some near-by town where the demand was limited and the price lower. In some cases it had to be stored for a considerable length of time until a buyer could be found.

IV. On cars covered by thirty-nine purchase orders, shipped by plaintiff and delivered to the Government at various camps, the hay was weighed and certificates of weight were furnished by the weighers who loaded the hay at the time of shipment. The Government weighers by different methods, sometimes by weighing a car that was coupled to other cars, sometimes by weighing a truck load and averaging the weights, and sometimes by weighing one or two bales and making an average of the weight of the cars, obtained weights less than the weights shown by the men who weighed the hay at the time of the shipments. The weights obtained by the Government weighers were erroneous. On account of these erroneous weights the Government deducted from monies due the plaintiff the sum of $2,541.19.

V. At times the Government repriced and regraded hay and deducted a certain discount without consulting the contractor. Contractor was not advised that these deductions had been made until the final settlement voucher had been

received some months later, sometimes as much as ten months after the regrading and repricing had been made. These notices were received too late for contractor to make a claim against the person from whom the hay was originally purchased. Very often the hay had been unloaded and its identity lost before contractor was notified. This hay was graded by men experienced in the hay business at and before the time of shipment.

The hay covered by twenty-five purchase orders, shipped by plaintiff and delivered to the Government, was regraded and repriced without contractor's knowledge or consent, and contractor was not notified of the regrading and repricing until it was too late to make a claim against the person from whom the hay was purchased. The amount deducted on these twenty-five purchase orders was $3,644.59.

VI. The hay covered by fourteen purchase orders, shipped by plaintiff and delivered to the Government, was rejected by the Government as not being up to grade. The hay so rejected was up to grade and in accordance with specifications. When the hay was rejected plaintiff was compelled to, and did, sell the same on the open market, obtaining the best price obtainable for the same, but less than the contract price. The difference between the contract price of the hay that was rejected and the price obtained by plaintiff on the open market was $10,285.64.

VII. During the period covered by the contract between plaintiff and the Government, the Government furnished cars for the shipment of hay on Government orders, which cars plaintiff was required to use. It was not always possible to load into the cars enough hay to meet the minimum weight, although said cars were loaded to their physical capacity of hay. The Government charged the contractor with freight on the difference between the actual weight and the minimum weight from the original point of shipment to final destination, together with a war tax on the penalty freight. The Government, on account of the scarcity of cars, required contractor to use these smaller cars. The Government paid the freight on the minimum-weight basis and afterwards deducted from the amount due the contractor the minimum or penalty freight charges on sixty-three

cars that were not loaded to their minimum but were loaded to their physical capacity, amounting to $265.67.

VIII. Certain purchase orders provided that an arbitrary freight rate was to be allowed plaintiff in addition to contract price, and in the event the shipment took a lesser rate than the rate agreed upon plaintiff was to get the advantage of said rate, but in the event that the shipment took a greater or higher rate the United States was to get the advantage of such rate. The Government took advantage of the higher rate, but did not give the plaintiff the advantage of the lower rate, and deducted on twenty-eight cars, where the rate was lower than the rate agreed upon, the sum of $122.12.

IX. In some instances definite destination was named to which delivery was made. Twenty-two cars were reconsigned to other points, and the Government deducted from moneys due the plaintiff the reconsignment charges on said twenty-two cars, amounting to $45.32.

X. Six cars of hay loaded by plaintiff and shipped to the Government were held for inspection longer than allowed by the railroads and demurrage accrued. The amount of the demurrage on the said six cars, namely, $80.34, was deducted by the Government from moneys otherwise due plaintiff.

XI. The claim sued on in this action was filed with the Secretary of War under the Dent Act, but the claims board refused to entertain jurisdiction on the ground that the purchase orders were formal contracts within the meaning of section 3744 of the Revised Statutes.

The court decided that plaintiff was entitled to recover $2,541.19 set forth in Finding IV, $3,644.59 set forth in Finding V, $10,285.64 set forth in Finding VI, $265.67 set forth in Finding VII, $122.12 set forth in Finding VIII, $45.32 set forth in Finding IX, and $80.34 set forth in Finding X, aggregating $16,984.87.

MOSS, *Judge*, delivered the opinion of the court:

This case was submitted with the cases of *Dyer & Company* v. *United States*, B–119, and *Albert Miller et al.* v. *United States*, B–121, on the evidence taken in the three cases. The opinion in the *Miller case*, decided as of this date, is appli-

cable to the questions involved in the instant case. Plaintiff is entitled to recover as follows:

On weight shortages	$2, 541. 19
Total rejections	10, 285. 64
Deductions for minimum car weights	265. 67
Reconsigning charges	45. 32
Demurrage deductions	80. 34
Underallowance on freight	122. 12
Repricing and regrading	3, 644. 59
Total	16, 984. 87

And it is so ordered.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

WEEHAWKEN DRY DOCK CO v. THE UNITED STATES

[No. C-942. Decided May 28, 1928]

On the Proofs

Contract for reconstruction of vessel; liquidated damages; delays and interference by Government.—A contract with the Government for reconstruction of a ship provided for deduction of liquidated damages for delay only where the delay was not for the convenience of the Government or not due to acts of God. But for the failure of the Government to furnish materials and supplies when required and promptly approve the plans, and for its removal of the vessel to another pier, which was unnecessary, the contractor could have completed the work on contract time. *Held*, that deduction of liquidated damages was improper and the contractor could also recover the additional expense due to the Government's delay and interference with the work.

The Reporter's statement of the case:

Mr. Jesse C. Adkins for the plaintiff. *Mr. Clarence W. De Knight* was on the briefs.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Dan M. Jackson* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation created by and existing under the laws of the State of New Jersey and at the times hereinafter stated was engaged in the business of building vessels by contract and of making repairs to all kinds of vessels, having its principal place of business at the foot of Baldwin Avenue, in the city or township of Weehawken, State of New Jersey.

II. On the 9th day of April, 1919, plaintiff, the Weehawken Dry Dock Company, a corporation, entered into a contract with the United States of America, represented by Captain William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby it undertook to furnish all necessary labor, material, equipment, and refit the S. S. *El Sol*, in accordance with specifications as contained in circular advertisement, M. & R. Schedule #330, dated April 5, 1919, thereto attached, at a total cost of $121,500.00, within 28 days from April 12, 1919, to wit, on or before May 10, 1919. Delays not for the convenience of the Government nor due to acts of God were to cause a deduction from the contract price at the rate of $1,000.00 per day of delay. A copy of said contract, as Exhibit B, and a copy of the specifications governing same as Exhibit A, are attached to plaintiff's petition and made a part of this finding by reference. Plaintiff's plant and piers were fully equipped with all the essential facilities for the performance of the work in hand, and the pier to which the vessels were fastened was secure and safe.

III. After inspection of piers belonging to the plaintiff company, at the foot of Baldwin Avenue, in the city or township of Weehawken, State of New Jersey, the officer in charge elected to have the work done at said piers and the vessel was accordingly delivered on April 12, 1919, by the Government to the plaintiff in the stream in front of the said piers and on the following day docked by the defendant's agents at the side of plaintiff's Pier #1.

IV. Supplementary to the said contract of April 9, 1919, the plaintiff on May 7, 1919, entered into a further contract with the United States of America, represented by Captain William L. MacQuillan, Quartermaster Corps, United States

Army, as contracting officer, whereby it was agreed that the plaintiff should receive $2,000.00 less than stipulated in said original contract, in consideration whereof plaintiff was to receive payments from time to time instead of one payment on completion of the work and its acceptance. A copy of said supplementary contract is attached to plaintiff's petition as Exhibit C and is made a part of this finding by reference.

V. When delivered to the plaintiff the vessel was dirty, ful of dunnage, ashes, trash, and filth. About four days' time was consumed in bringing the ship into a condition whereby the work contemplated could be started. This delay, together with the delay of one day in docking the boat, resulted in a further contract dated May 9, 1919, supplementary to the said contract of April 9, 1919, as modified, between the United States of America, represented by Captain William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, and the plaintiff, whereby it was agreed that the time limit for completion of the work and deliveries should be extended five days, or to May 15, 1919. A copy of said supplemental contract is attached to plaintiff's petition as Exhibit D and is made a part of this finding by reference.

VI. Plaintiff entered into a further contract dated May 10, 1919, with the United States of America, represented by Captain William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby it undertook to furnish materials and services for construction work on the S. S. *El Sol* in accordance with letter of proposal dated May 10, 1919, at a total cost of $8,760.00, all work under the contract to be performed at the contractor's yard and completed May 25, 1919. A copy of said contract and of the proposal letter governing same was attached to plaintiff's petition as Exhibit E and is made a part hereof by reference.

Much of the work under this contract, because of its nature, had to be completed before it was possible to begin or complete various items of the original contract.

VII. On June 4, 1919, the work of refitting the S. S. *El Sol* under the contract of April 9, 1919, and the agreements of May 7, 1919, and May 9, 1919, supplemental thereto, and the

contract of May 10, 1919, was completed and accepted by the Government.

VIII. $20,000.00 as liquidated damages for the 20 days' time the completion of the work under the contracts was delayed beyond the time fixed in the agreement of May 9, 1919, extending the time limit, was deducted by the Government from the contract price as fixed therein, and said sum of $20,000.00 was withheld by the Government and was not included in the payments made to the contractor upon the completion and acceptance of the work under the contracts. Plaintiff protested against the withholding of this money.

IX. On May 7, 1919, on order of the defendant, the vessel was removed over plaintiff's objection from plaintiff's pier at Weehawken to the Government's pier #12. The Government pier was poorly situated and equipped for efficient work as compared with plaintiff's pier, and this movement and the matters connected therewith and resulting therefrom caused delay and added expenses to the plaintiff.

X. The S. S. *El Oriente* and the S. S. *Amphion* were being repaired by plaintiff at the same time and place, and under a similar contract. One of these vessels, when delivered at the pier, was lying a few feet outside the pier. It was later properly placed so that it did not project beyond the pier. The *El Sol* at low tide was aground to the extent of a few feet, but was entirely afloat at half tide. The loading of the ballast, which weighed 250 tons, would have increased the draft 5.9 inches. This was not an uncommon situation in such circumstances. The vessels were securely attached to the pier by lines passing over and around the stringers. Plaintiff's pier was well equipped with proper facilities and was a safe and suitable place for the performance of the work under the contract.

XI. The defendant failed to provide the necessary materials at such time or times as required by the plaintiff and was consistently slow in passing upon the various and numerous plans submitted to its officers by the plaintiff. This caused added delay and expense to the plaintiff.

XII. But for the failure of the Government to furnish materials and supplies when required, and its failure promptly to approve the plans for work upon the vessels,

and but for its removal of the vessels in the midst of the work, plaintiff could and would have completed the work and delivered the vessels within contract time.

XIII. Because of the delays as found above, and the removal of the vessel from plaintiff's pier, plaintiff incurred additional cost and expense as follows:

1 hr. for each man in transportation from yard to ship and return		$4,147.00
Car fare from yard to ship and return at 10¢		517.00
2 trucks and drivers, 23 days, at $20 per day		920.00
One-half the expenses supplying facilities at Government pier for performance of work (the other half chargeable to *El Oriente*):		
Connecting from water main to ship	$67.50	
Installing telephone	28.00	
Hiring steam lighter at $50 per day	575.00	
Installing on lighter 12-tool air compressor at $40 per day	460.00	
Towage on steam lighter	15.00	
Engineer at $7.20 per day, 22 days	79.20	
Fireman at $5.20 per day, 22 days	57.20	
Overtime for engineer and fireman, 2 hrs. per day	68.20	
Connecting air pipe from lighter to ship; furnishing pipe connection and labor, 6 days, machinist and 4 helpers	32.00	
Pipe and fittings	34.00	
		1,416.10
10% of labor paid ($50,229.40) while moving ship from Weehawken to Hoboken, waiting for blue prints to be O. K'd, and waiting for material to be furnished by Government		5,022.94
Loss of efficiency of labor by moving ship to Hoboken, 10%		5,019.60
Overhead, during delays		2,046.58
		19,089.22

The court decided that plaintiff was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

On April 9, 1919, plaintiff entered into a contract with the United States by which it agreed to furnish the labor and certain portions of the material for the repair of the S. S. *El Sol*, in accordance with specifications attached to and made a part of same, for which plaintiff was to receive $121,500. The work was to be completed on or before May

10, 1919. On May 7, 1919, the parties agreed, by a supplemental contract, that plaintiff should receive $2,000 less than the amount stipulated in the contract, in consideration for which plaintiff was to be paid from time to time, as the work progressed, instead of one payment on the completion thereof. By another agreement of date May 9, 1919, the time limit for the completion of the contract was extended five days, or to May 15, 1919. A further supplemental contract was entered into between the parties on May 10, 1919, whereby plaintiff undertook to furnish material and labor for certain other work on said vessel at a total cost of $8,760. On June 4, 1919, the entire contract was completed, and the vessel was delivered to the Government. The sum of $20,000 was retained by defendant as liquidated damages under a provision of the contract for the deduction from payments to plaintiff of $1,000 per day for each day's delay beyond the date fixed for the completion of the contract. After an inspection of plaintiff's piers, the officer in charge for the Government directed that the work be done at said piers. On May 7, 1919, while the work was in progress, the vessel was removed by order of defendant to a Government pier.

Plaintiff is suing for the recovery of the $20,000 deducted as liquidated damages and for the $35,718.93 as additional cost of plaintiff occasioned by delays by the Government and by the removal of the vessel to the Government pier.

The contract provided that certain materials were to be furnished by the defendant and installed by plaintiff. The Government failed to provide these materials as they were required. There were fifty-six other vessels under process of reconditioning at the same time. The work in progress involved the expenditure of millions of dollars, and the demand for materials was greater than the supply. All these vessels were intended for service as troop transports for the returning soldiers, and preference was being given to the work on the larger vessels. Under the contract the Government was to furnish and stow the ballast, which consisted of steel rails and billets. It was a difficult and dangerous operation. Much of the work under the original contract could not be begun until after the stowage of the ballast, which should have been completed within a week

after the beginning of the work. It was actually delivered and stowed between May 10 and May 22. The evidence shows beyond question that the delay in the completion of this work was occasioned by the Government, and was in no sense the fault of plaintiff.

On the question of plaintiff's claim growing out of the removal of the vessel from plaintiff's pier, the evidence shows that plaintiff had a well-equipped plant which occupied a yard area of about eight acres. It had two piers, one of which was sixty feet wide and four hundred feet long, and the other, one hundred feet wide and three hundred feet long. There were four dry docks with a capacity of ten thousand to fifteen thousand tons. It had wood shops, machine shops, a boiler shop, and a large stock of material. It contained a waterworks system, power plant, compressed-air plant, a system of lights, and every essential facility and equipment for the convenient and economical prosecution of the work on which plaintiff was engaged. Defendant contends that plaintiff's pier was insecure and, in certain particulars, in a state of partial decay; that it lacked suitable bits, or cleats, for fastening the ropes to hold the vessel, which made it necessary to pass the ropes over and around the stringers; that with the additional weight of the ballast, which at that time had not been loaded, there was insufficient water to keep the vessel afloat; that the vessel extended beyond the pier into the river to the extent of thirty or forty feet, so that passing boats were liable to come in contact with it. It should be remembered that the Government's officer in charge made a personal inspection of plaintiff's pier, and selected it as a suitable and proper place for the performance of the work.

The condition on May 7, when the vessel was removed, had not been changed in any particular. The Government pier was about fifteen feet wide and had a standard railroad track down the center and was therefore accessible only at the shore end of the pier. There was no place for the storage of raw material, which made it necessary to transport same by boat or truck in small lots, from day to day, and as it was used. Plaintiff's workmen, under their contract

of employment, continued to report for duty at plaintiff's pier, and it was necessary to transport them from that point to the Government pier. In addition to the increased daily expenditures occasioned by the move, plaintiff was compelled to provide, at a substantial expense, facilities for the performance of the work.

The evidence fails to sustain defendant's contention that plaintiff's pier was unsuitable or insecure. The S. S. *Oriente*, C–941, and the S. S. *Amphion*, C–977, involved in separate actions, were being repaired at the same time and place. One of these vessels, when delivered, was lying a few feet outside the pier. It was later properly placed so that it would not project beyond the pier. The *El Sol* at low tide was aground to the extent of a few feet, but was entirely afloat at half tide. The loading of the ballast, which weighed 250 tons, would have increased the draft 5.9 inches. This was not an uncommon situation and presented no serious difficulties. The complaint that the vessels were attached to the pier by lines passing over and around the stringers is equally without merit. The method employed in securing the vessels is immaterial. They were, in fact, securely fastened and that was the important requirement. The situation at plaintiff's pier was not such as to justify the removal of the vessel, and the Government is liable for any additional cost occasioned thereby.

Defendant takes the position that plaintiff accepted, without protest, the final payment, which was the remainder due plaintiff on completion and delivery of the vessel, less the deduction of $20,000 for liquidated damages. This contention is not borne out by the record. While the question of the deduction of the $20,000 was in the hands of the Auditor for the War Department for adjustment, plaintiff was advised that the Government would pay $5,000 on account of money which had been withheld on *El Sol*, and $5,000 on *El Oriente*, whereupon on August 6, 1919, plaintiff forwarded two vouchers to defendant for $5,000 each, stating, however, that the amount would be accepted under protest and without prejudice to further claim for the amount which had been deducted. When this sum was later

received by plaintiff, there was no necessity for a renewal of the protest theretofore registered. But if there had been no formal protest, the mere acceptance of a smaller sum than the full amount claimed would not estop plaintiff from prosecuting its claim for the full amount. *Lancaster et al.* v. *United States*, 57 C. Cls. 284.

Plaintiff is entitled to recover the sum of $39,089.22, and it is so adjudged and ordered.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JOHN L. MURPHY v. THE UNITED STATES

[No. D-313. Decided May 28, 1928]

On the Proofs

Navy pay; commission without compliance with statute; service as de facto *officer; suit for pay of commissioned officer.*—See *Beeman* v. *United States, ante*, p. 431.

The Reporter's statement of the case:

Mr. Cornelius H. Bull for the plaintiff. *King & King* were on the brief.

Messrs. James J. Lenihan and *Frank J. Keating*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On February 13, 1918, the plaintiff was assigned the provisional rank of ensign, U. S. Naval Reserve Force, and from that date to July 31, 1918, he was on active duty under such provisional appointment.

Plaintiff was on February 25, 1918, by orders approved by the Navy Department, appointed a naval aviator for duty involving actual flying in aircraft, and such designation remained in force during the entire period covered by this claim, to wit, until July 31, 1918. On March 13, 1918, he was admitted for treatment at the U. S. Naval Hospital at Chelsea, Mass., and discharged therefrom July 30, 1918.

He thereafter reported for duty at the naval air station, Pensacola, Fla.

II. Plaintiff did not receive an increase of 50 per centum of pay as an ensign from May 1, 1918, to July 31, 1918; if entitled thereto there would be due him $212.50.

III. On February 13, 1918, the plaintiff was serving in the enlisted rank of a quartermaster, first class, U. S. Naval Reserve Force, and on that date was assigned the provisional rank of ensign in class 5 of the U. S. Naval Reserve Flying Corps, which appointment he accepted on February 25, 1918. Plaintiff was not examined for such appointment and commission by a board of three naval officers nor by a board of medical officers, as required by the act of August 29, 1916 (39 Stat. 587).

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

This is a suit to recover $212.50 which plaintiff claims is due him for services in the U. S. Naval Reserve Force from May 1, 1918, to July 31, 1918, when he was detailed to duty involving flying, basing his claim on the act of March 3, 1915 (38 Stat. 939).

On February 13, 1918, plaintiff, who was then serving in the enlisted rank of a quartermaster, first class, U. S. Naval Reserve Force, was given the provisional rank of ensign, class 5, U. S. Naval Reserve Flying Corps, which he accepted on February 25, and served as such until July 31, 1918. He was not examined or recommended for this appointment by a board of three naval officers nor by a board of medical officers, as required by the act of August 29, 1916 (39 Stat. 556, 587, 588).

This case is ruled by the *Beeman case*, D–129, decided by this court April 16, 1928. See also *Kearney* v. *United States*, D–804, this day decided (*post*, p. 683).

The petition should be dismissed, and it is so ordered.

WEEHAWKEN DRY DOCK CO. v. THE UNITED STATES

[No. C-941. Decided May 28, 1928]

On the Proofs

Contract for reconstruction of vessel; liquidated damages; delays and interference by Government.—See *Weehawken Dry Dock Co.* v. *United States*, *ante*, p. 662.

The Reporter's statement of the case:

Mr. Jesse C. Adkins for the plaintiff. *Mr. Clarence W. De Knight* was on the briefs.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Dan M. Jackson* was on the brief.

The court made special findings of facts, as follows:

I. Plaintiff is a corporation created by and existing under the laws of the State of New Jersey and at the times hereinafter stated was engaged in the business of building vessels by contract and of making repairs to all kinds of vessels, having its principal place of business at the foot of Baldwin Avenue, in the city or township of Weehawken, State of New Jersey.

II. On the 12th day of April, 1919, plaintiff, the Weehawken Dry Dock Company, a corporation, entered into a contract with the United States of America, represented by Capt. William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby it undertook to furnish all necessary labor, material, equipment, and refit the S. S. *El Oriente*, in accordance with specifications as contained in circular advertisement, M. & R. Schedule No. 331, dated April 9, 1919, thereto attached, at a total cost of $129,500, within 28 days from April 15, 1919, to wit, on or before May 13, 1919. Delays not for the convenience of the Government nor due to acts of God were to cause a deduction from the contract price at the rate of $1,000 per day of delay. A copy of said contract as Exhibit B and a copy of

the specifications governing same as Exhibit A were attached to plaintiff's petition and are made a part hereof by reference.

Plaintiff's plant and piers were fully equipped with all the essential facilities for the performance of the work in hand, and the pier to which the vessels were fastened was secure and safe.

III. After inspection of piers belonging to plaintiff company, at the foot of Baldwin Avenue, in the city or township of Weehawken, State of New Jersey, the officer in charge elected to have the work done at said piers, and the vessel was accordingly delivered on April 15, 1919, by the Government to the plaintiff in the stream in front of the said piers and on the following day docked by the defendant's agents at the north side of plaintiff's Pier No. 1.

IV. Supplementary to the said contract of April 12, 1919, the plaintiff, on May 7, 1919, entered into a further contract with the United States of America, represented by Capt. William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby it was agreed that the plaintiff should receive $2,000 less than stipulated in said original contract, in consideration whereof plaintiff was to receive payments from time to time instead of one payment on completion of the work and its acceptance. A copy of said supplementary contract was attached to plaintiff's petition as Exhibit C and is made a part hereof by reference.

V. When delivered to the plaintiff the vessel was dirty, full of dunnage, ashes, trash, and filth. About four days' time was consumed in bringing the ship into a condition whereby the work contemplated could be started. This delay, together with the delay of one day in docking the boat, resulted in a further contract dated May 12, 1919, supplementary to the said contract of April 12, 1919, as modified, between the United States of America, represented by Capt. William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, and the plaintiff, whereby it was agreed that the time limit for completion of the work and deliveries should be extended five days, or to May 18, 1919. A copy of said supplemental contract was

attached to the plaintiff's petition as Exhibit E and is made a part hereof by reference.

VI. Plaintiff entered into a further contract dated May 10, 1919, with the United States of America, represented by Capt. William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby it undertook to furnish further materials and services for construction work on the S. S. *El Oriente* in accordance with letter of proposal dated May 10, 1919, at a total cost of $10,170, all work under the contract to be performed at the contractor's yard and completed May 20, 1919. A copy of said contract and of the proposal letter governing same was attached to plaintiff's petition as Exhibit D and is made a part hereof by reference.

Much of the work under this contract, because of its nature, had to be completed before it was possible to begin or complete various items of the original contract.

VII. On June 7, 1919, the work of refitting the S. S. *El Oriente*, under the contract of April 12, 1919, and the contract of May 10, 1919, was completed and accepted by the Government.

VIII. Twenty thousand dollars as liquidated damages for the 20 days' time the completion of the work under the contracts was delayed beyond the time fixed in the agreement of May 12 extending the time limit was deducted by the Government from the contract price as fixed therein, and said sum of $20,000 was withheld by the Government and was not included in the payments made to the contractor upon the completion and acceptance of the work under the contracts. Plaintiff protested against the withholding of this money.

IX. On May 7, 1919, on order of the defendant, the vessel was removed over plaintiff's objection, from plaintiff's pier at Weehawken to the Government's Pier No. 12. The Government pier was poorly situated and equipped for efficient work as compared with plaintiff's pier, and this movement and the matters connected therewith and resulting therefrom caused delay and added expense to the plaintiff.

X. The defendant failed to provide the necessary materials at such time or times as required by the plaintiff and

was consistently slow in passing upon the various and numerous plans submitted to its officers by the plaintiff. This caused added delay and expense to the plaintiff.

XI. But for the failure of the Government to furnish materials and supplies when required, and its failure to promptly approve the plans for work upon the vessels, and but for its removal of the vessels in the midst of the work, plaintiff could and would have completed the work and delivered the vessels within contract time.

XII. Because of the delays as found above, and the removal of the vessel from plaintiff's pier, plaintiff incurred additional cost and expense as follows:

Item		Amount
One hour for each man in transportation from yard to ship and return		$3,770.80
Car fare from yard to ship and return at 10¢		497.20
Two trucks and drivers, 23 days, at $20 per day		920.00
One half the expenses supplying facilities at Government pier for performance of work. (The other half chargeable to *El Sol.*)		
Connecting from water main to ship	$67.50	
Installing telephone	28.00	
Hiring steam lighter, 23 days, at $50 per day	575.00	
Installing on lighter 12-tool air compressor, 23 days, at $40 per day	460.00	
Towage on steam lighter	15.00	
Engineer at $7.20 per day, 22 days	79.20	
Fireman at $5.20 per day, 22 days	57.20	
Overtime for engineer and fireman, 2 hours per day, 22 days	68.20	
Connecting air pipe from lighter to ship; furnishing pipe connection and labor, 6 days, machinist and 4 helpers	32.00	
Pipe and fittings	34.00	
		1,416.10
10 per cent of labor paid ($48,232.80) while moving ship from Weehawken to Hoboken; waiting for blue prints to be O. K'd, and waiting for materials to be furnished by Government		4,823.28
Loss of efficiency of labor by moving ship to Hoboken, 10 per cent		4,823.28
Overhead, during delays		2,527.26
		18,777.92

The court decided that plaintiff was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

This case was argued and submitted with two other cases between the same parties, C–977 and C–942. The opinion in the latter case decided as of this date is applicable to the issues involved herein. Under the ruling of the court in that case plaintiff is entitled to recover the sum of $20,000 deducted by the Government from payments due plaintiff as liquidated damages. It is further entitled to recover the sum of $18,777.92 as additional cost and expense due to delays by the Government, and to the removal of the vessel from plaintiff's pier as stated in Finding XII.

Plaintiff is entitled to recover the sum of $38,777.92, and it is so adjudged and ordered.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

EDWARD A. FAUST v. THE UNITED STATES

[No. E–405. Decided May 28, 1928]

On the Proofs

Income and excess-profits taxes; date of payment of executor's statutory fee; constructive receipt.—Where the administration of an estate was practically completed at the end of the year 1914, but a coexecutor's statutory fee, due to disagreement among the executors and a beneficiary, was not paid to him until the year 1917 nor prior thereto set apart or directed by the executors or the court to be paid, although in 1914 there were sufficient assets in the executors' hands to have paid it, there was no constructive receipt thereof in 1914 and it was properly taxable as a part of the coexecutor's income for 1917.

Same; executor of estate; trade or business.—The executor of an estate, who does not make his activities as executor his trade or business, is not subject to the excess-profits tax, or the tax of 8 per cent on net income not derived from invested capital, applicable under the income tax laws to a trade or business.

The Reporter's statement of the case:

Mr. Spencer Gordon for the plaintiff. *Covington, Burling & Rublee* were on the brief.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Edward A. Faust, during the year 1914 and since that time has been a resident of the city of St. Louis, Missouri, and has always been a citizen of the United States.

II. Adolphus Busch died October 10, 1913, and by his will appointed as executors thereof Lilly Busch (his widow), Edward A. Faust, the plaintiff (his son-in-law), and Charles Nagel. Said executors qualified as such and proceeded to administer his estate.

III. The statutory commission allowed executors by the statutes of Missouri at that time was 5 per cent on the value of the assets and cash distributed. The estate of Adolphus Busch exceeded $30,000,000. During the month of May, 1914, a conference was held for the purpose of determining the fees for the executors, at which were present the three executors, and Mr. August A. Busch, the eldest son of the testator, a trustee of the estate, and as such and personally one of the largest beneficiaries under the will, and it was agreed at that conference that the executors would not claim their statutory commissions but that in lieu thereof Charles Nagel should be entitled to receive $300,000, the plaintiff, Edward A. Faust, $150,000, and Mrs. Lilly Busch nothing. Prior to this conference there had already been paid to the plaintiff on account of such commissions $21,666.67 on or about March 12, 1914. After the conference one of the members of the decedent's family expressed the opinion that the plaintiff, Edward A. Faust, should take no fee for his services as executor, and the plaintiff thereupon agreed by written instrument that he would not take any fee and paid back to the estate the $21,666.67 that he had already received. Later, in November, 1914, on advice of counsel employed by the plaintiff to represent him he repudiated his agreement that he would take no fee and asserted his claim for full commission as executor as allowed by statute. Mrs. Lilly Busch was then in Germany. During her absence the other two executors did not take any action as to the plaintiff's fee. Mrs. Busch was in Germany at the outbreak of the World War, and owing to war conditions she did not return until 1917.

Mrs Busch, upon her return to the United States in 1917, gave her consent to the payment of $150,000 to the plaintiff, and in February, 1917, this fee was paid to the plaintiff. In 1914, the plaintiff retained counsel to protect his interests and prosecute his claim against the estate of Adolphus Busch, deceased, for fee alleged to be due him as an executor of that estate. Said counsel so represented the plaintiff until payment of the said fee was made in February, 1917, in the sum of $150,000. For the service thus rendered, the plaintiff paid the said counsel the sum of $10,000 which was taken as a deduction by the plaintiff and allowed as such by the Commissioner of Internal Revenue in computing the income tax due from the plaintiff for the year 1917.

IV. Meanwhile payments had been made to the other executor, Mr. Charles Nagel, in conformity with the agreement, totaling $300,000.00. These payments were made during the year 1914. When the payment of $150,000 was made to the plaintiff, Edward A. Faust, in 1917 the sum of $20,192.03 was added as interest on that amount calculated from the dates of payments to Mr. Nagel. During the year 1914 and at time of the conference when the agreement was made, there were sufficient assets in the hands of the executors to have paid the $150,000 fee to the plaintiff, Edward A. Faust, in that year.

V. The administration of the estate of Adolphus Busch was practically completed by the end of 1914, by which time most of the estate had been distributed to the beneficiaries and to the trustees named under the will. Prior to November, 1914, the plaintiff's office had been in the same building as the office of the estate, but in November, 1914, after this feeling arose about this commission he established an office in a different building and thereafter devoted very little time to the affairs of the Busch estate. The trustees, to whom the greater part of the estate had been distributed, practically became the active managers of the estate. From 1914 to 1917 the plaintiff was only required to sign a few papers in connection with the estate. The "Final Settlement and Discharge" in this estate was filed July 6, 1917.

VI. The plaintiff has never acted as an executor of any other estate except that of his father and mother. For about

fifteen years prior to 1914 the plaintiff had been vice president of the Anheuser-Busch Brewing Association and held that office until the fall of 1914, devoting all of his time to the duties of that office until he was appointed an executor of the Busch estate on October 29, 1913. Subsequently and to and including November, 1914, he devoted a large amount of his time to the administration of the said Busch estate. He resigned as vice president of the Anheuser-Busch Brewing Association in November, 1914, when the controversy over this fee arose, and for the remainder of 1914 and to and including the year 1917 his time was occupied as follows: He was general manager of the St. Louis Refrigerator Car Company and received a salary of $5,000 as such during the year 1917. He also was taking care of the assets of his wife resulting from her inheritance from the Busch estate. Mrs. Faust had a large estate and he devoted a great deal of time to its management. He was also director of the National Bank of Commerce, the Laclade Gas, and various other corporations. He also devoted a considerable amount of time to his own personal investments in 1914.

VII. The plaintiff filed his income and excess-profits tax return for 1917 and paid taxes thereon of $30,468.33 to the United States on or about June 24, 1918. Thereafter, on or about August 2, 1920, the additional amount of $17,241.27 was assessed against the plaintiff as income and excess-profits taxes for the year 1917 and this additional amount was paid to the United States by the plaintiff on or about October 18, 1920, making a total of $47,709.60 income and excess-profits taxes paid by the plaintiff for the year 1917. In determining these income and excess-profits taxes the Bureau of Internal Revenue included as part of the plaintiff's income for the year 1917 the executor's fee of $150,000 (less $10,000 attorney's fee which the plaintiff paid in connection therewith) and the Bureau of Internal Revenue assessed excess-profits taxes on the plaintiff's income.

VIII. September 18, 1922, the plaintiff filed a claim for refund of 1917 taxes in the sum of $38,072.67. This amount was disallowed in its entirety by the Commissioner of Internal Revenue June 28, 1923.

IX. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted, or given encouragement to rebellion against said Government; he is the sole and absolute owner of the claim herein presented and has made no transfer or assignment of said claim or any part thereof, and he is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

The court decided that plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Adolphus Busch, a resident of the State of Missouri, died October 10, 1913, and by his will appointed as executors thereof his widow, Lilly Busch; his son-in-law, Edward A. Faust, the plaintiff herein; and Charles Nagel. These executors qualified and proceeded to administer his estate, which exceeded $30,000,000.

The statutory commission allowed executors by the laws of Missouri at that time was 5 per cent of the value of the assets and cash distributed, but at a conference held by the executors and August A. Busch, the eldest son of the testator and one of the largest beneficiaries under the will, in May, 1914, it was agreed that this statutory commission would not be claimed by the executors, but in lieu thereof Charles Nagel should receive $300,000; the plaintiff, Edward A. Faust, $150,000; and Mrs. Lilly Busch, nothing. Prior to the conference, the plaintiff had already received on account of his commission $21,666.67; but after the conference one of the members of the decedent's family having expressed the opinion that the plaintiff should take no fee for his services as executor, the plaintiff thereupon agreed by written instrument that he would not take any fee and paid back to the estate the amount which he had already received. Later, in November, 1914, on the advice of counsel, the plaintiff repudiated his agreement to take no fee and asserted a claim for full commission as allowed by the statute. Mrs. Lilly Busch being then absent and in Germany, no action was taken until her return in 1917, when, upon her consent being given to the payment of $150,000 to plaintiff, this fee was

paid to him in February, 1917. In the meantime, the plaintiff had employed counsel to prosecute his claim against the estate at an expense of $10,000, which was subsequently taken as a deduction by him and allowed by the Commissioner of Internal Revenue in computing the income tax due from the plaintiff in the year 1917.

The main issue in the case is whether this fee of $150,000 was taxable in the year 1914, when the original agreement was made between him and the other executors that he would accept this sum of $150,000, or in 1917, when it was actually paid to him; and also whether it is subject to an excess-profits tax. There being no excess-profits tax in 1914, the last question will apply only in case it is found that the plaintiff's fee as executor is taxable in 1917, and this question will first be determined.

It is true that the law contemplates and the regulations provided that income which is credited to the account of or set apart for a taxpayer and which may be drawn upon at any time is subject to tax for the year during which it is so credited or set apart. Although not then actually reduced to possession, it also appears that there was sufficient assets in the hands of the executors to have paid the $150,000 fee to the plaintiff in 1914, but there is no evidence that this money was at any time set apart to him as a fund for the purpose of paying his fee nor that the executors or the court directed it to be paid. The other executors in fact could have withheld the payment until the time came for the final settlement of the estate if they had seen fit, but beyond all this the plaintiff made payment impracticable by making a statement in writing that he would not accept anything. Subsequently, he repudiated this statement and demanded his full fee. In this situation the other executors declined to take any action until Mrs. Busch, who was absent in Europe, returned. Finally, in 1917, the matter was settled by paying the plaintiff the sum he had originally agreed upon, namely, $150,000, together with interest thereon in the sum of $20,192.03, being computed from the dates when payment was made to his coexecutor Nagel. Under these circumstances, we think it clear that there was no constructive

Opinion of the Court

receipt of this fee in 1914 and that it was properly taxable as a part of his income for the year 1917.

The next question is whether this fee was subject to an excess-profits tax. The report of the special agent, which reviewed the plaintiff's tax return for 1917, shows that this fee of $150,000 was not only included as part of plaintiff's income for that year but was assessed under the provisions of the excess-profits act of 1917, which applied to profits made in a trade or business, and where there was no invested capital required the payment of a tax of 8 per cent of the net income of such trade or business.

The Treasury regulations (article 8, Regulations 41) construe the term " trade or business " as an activity for gain or profit entered into with sufficient frequency, or occupying such a portion of the taxpayer's time or attention as to constitute a vocation. But the regulations also state that " Gains or profits from transactions entered into for profit, but which are isolated, incidental, or so infrequent as not to constitute an occupation " are not subject to excess-profits taxes.

There is nothing in this case that would bring this fee within the scope of these regulations. An examination of Finding VI will show that his service as executor was " isolated " and " incidental " to his other activities, which as shown by Finding VI were very numerous; but neither before nor since has he ever acted as the executor of any other estate except that of his father and mother. It may be difficult to name any particular business as being that of the plaintiff, and his other occupations would not prevent his giving considerable time from May to November, 1914, to his duties as executor, but there is nothing in the evidence to show that the principal part of his time was occupied with this business. In fact it would be a fair inference, taking into consideration the numerous other duties which he had, that only a comparatively small part of his time was so used. It is quite plain that being an executor did not constitute his vocation. It was not his profession or anything that he held himself out as prepared to do. See *Cadwalader v. Lederer*, 273 Fed. 879; affirmed by the Circuit Court of Appeals in 274 Fed. 753.

The plaintiff's income tax for 1917 should have been computed by including the executor's fee (after deducting the attorneys' fee paid in connection therewith) in the gross income of the plaintiff, but it should not have been assessed with the excess-profits tax. When so computed, the plaintiff is entitled to recover the difference between the amount with which he was properly taxable and the amount actually paid by him for that year.

It seems to have been assumed by plaintiff that the overpayment under the rule laid down would be the amount of the excess-profits tax, to wit, $11,184, but the proof is not sufficient to show the correct amount of the refund. An examination of the report of the Government's special agent, offered in evidence, shows that the amount of the excess-profits tax assessed was deducted in order to ascertain plaintiff's net income. The evidence does not show how the computation of the tax was finally made but it is clear that no such deduction should be made. In order to ascertain the refund to which plaintiff is entitled the correct amount of his tax must first be computed in accordance with the rules laid down in this opinion. As there is not sufficient evidence to enable this to be done, the cause will be remanded to the general docket for further proof, and when the amount of the refund is determined judgment will be entered accordingly. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice,* concur.

PATRICK E. KEARNEY v. THE UNITED STATES

[No. D-804. Decided May 28, 1928]

On the Proofs

Navy pay; commission without compliance with statute; service as de facto *officer; suit for pay of commissioned officer.*—See *Beeman* v. *United States, ante,* p. 431.

Same; deduction of money already paid.—When money has been paid for services actually rendered by a *de facto* officer the Government has presumably benefited to the extent of the payment, and the officer so serving is not required to make refund.

Where the amount paid has been taken from him by way of deduction from amounts otherwise due he can recover the deduction in suit against the United States.

The Reporter's statement of the case:

Mr. Cornelius H. Bull for the plaintiff. *King & King* were on the brief.

Messrs. James J. Lenihan and *Frank J. Keating*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On July 26, 1918, the plaintiff, Patrick E. Kearney, was assigned the provisional rank of ensign, U. S. Naval Reserve Force, class 5, and he accepted such assignment on the same day. Plaintiff was not examined by a board of three officers nor by medical officers, as required by the act of August 29, 1916. On July 27, 1918, while serving under such assignment at the naval air station, Pensacola, Fla., he was designated a naval aviator and detailed for duty as such.

While so serving plaintiff received orders from the Bureau of Navigation, dated September 8, 1919, directing him to proceed to Nashville, Tenn., for temporary duty in connection with aviation recruiting.

Plaintiff proceeded as directed and remained at Nashville, Tenn., on said recruiting duty from September 19, 1919, until February 13, 1920. While on said recruiting duty plaintiff performed several flights in Government aircraft.

From July 27, 1918, until February 13, 1920, plaintiff's designation as naval aviator remained in effect and unrevoked.

During the period September 19, 1919, to February 13, 1920, plaintiff was serving under his provisional assignment of the rank of ensign, U. S. Naval Reserve Force.

II. During the period September 19, 1919, to October 31, 1919, plaintiff received an increase in pay for the performance of flying duty in the sum of $99.17, but later this amount was checked against other accounts due plaintiff by the General Accounting Office. If entitled to 50 per centum increase of pay as an ensign for the performance of aviation

duty from September 19, 1919, to October 31, 1919, there will be due him $99.17.

During the period November 1, 1919, to February 13, 1920, plaintiff received no increase in pay for the performance of flying duty. If entitled to 50 per centum increase of pay as an ensign for the performance of aviation duty from November 1, 1919, to February 13, 1920, there will be due him $243.19.

The court decided that plaintiff was entitled to recover $99.17.

GRAHAM, *Judge*, delivered the opinion of the court:

Plaintiff is suing to recover $342.36, which he alleges is due him as increased pay for services during his provisional assignment to the rank of ensign, U. S. Naval Reserve Force, from September 19, 1919, to February 13, 1920. He was assigned the said rank on July 26, 1918, and accepted it on that date. He was not examined by a board of three naval officers nor by a board of medical officers, as required by the act of August 29, 1916, 39 Stat. 556, 587, 588. While serving under the said assignment at the naval air station, Pensacola, Fla., he was designated a naval aviator and detailed for duty as such.

During the period from September 19, 1919, to October 31, 1919, he received an increase in pay for the performance of flying duty in the sum of $99.17, but later this amount was checked against other sums due him. From November 1, 1919, to February 13, 1920, plaintiff received no increase in pay for the performance of flying duty. If plaintiff is entitled to 50 per cent increase in pay for the periods mentioned, under the act of March 3, 1915, 38 Stat. 939, he is entitled to recover the amount of $342.36.

This case is ruled by the case of *Beeman* v. *United States*, D–129, decided by this court April 16, 1928. However, $99.17 of the amount claimed was once paid to the plaintiff and later checked against other sums due him. As to this he is entitled to recover. See *Royer* v. *United States*, 59 C. Cls. 199, 268 U. S. 394, and the *Beeman case*, *supra*.

Reporter's Statement of the Case

Judgment should be entered for plaintiff, and it is so ordered.

The counterclaim filed by defendant has been withdrawn.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice,* concur.

WEEHAWKEN DRY DOCK CO. v. THE UNITED STATES

[No. C-977. Decided May 28, 1928]

On the Proofs

Contract for reconstruction of vessel; liquidated damages; delays and interference by Government.—See *Weehawken Dry Dock Co.* v. *United States, ante,* p. 662.

The Reporter's statement of the case:

Mr. Jesse C. Adkins for the plaintiff. *Mr. Clarence W. De Knight* was on the briefs.

Mr. George Dyson, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant. *Mr. Dan M. Jackson* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation created by and existing under the laws of the State of New Jersey and at the times hereinafter stated was engaged in the business of building vessels by contract and of making repairs to all kinds of vessels, having its principal place of business at the foot of Baldwin Avenue, in the city or township of Weehawken, State of New Jersey.

II. On the 28th day of March, 1919, plaintiff, the Weehawken Dry Dock Company, a corporation, entered into a contract with the United States of America represented by Captain William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby it undertook to furnish all necessary labor, material, equipment, and refit the S. S. *Amphion,* in accordance with specifications as

contained in circular advertisement, M. & R. Schedule #328, dated March 26, 1919, thereto attached, at a total cost of $119,000, within 28 days from April 4, 1919, to wit, on or before May 2, 1919. Delays not for the convenience of the Government nor due to acts of God were to cause a deduction in the contract price at the rate of $1,000 per day of delay. A copy of said contract, as Exhibit B, and a copy of the specifications governing same, as Exhibit A, were attached to plaintiff's petition and are made a part hereof by reference.

III. The said vessel was delivered by the Government to the plaintiff in the stream in front of plaintiff's piers on April 4, 1919.

IV. Supplementary to the said contract of March 28, 1919, the plaintiff, on May 2, 1919, entered into a further contract with the United States of America, represented by Captain William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby it was agreed that the time limit for completion of the work should be extended from May 2 to May 7, 1919. A copy of said supplemental contract was attached to plaintiff's petition as Exhibit C and is made a part hereof by reference.

V. On the same date, to wit, May 2, 1919, the plaintiff entered into a further contract with the United States of America, represented by Captain William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby it undertook to furnish labor, material, and equipment necessary to make additional repairs on the S. S. *Amphion*, in accordance with certain specifications thereto attached, for the additional sum of $8,510.80. This work was to be begun on said date of May 2 and to be completed May 12, 1919. A copy of said contract, together with the itemized proposal accompanying same, was attached to plaintiff's petition as Exhibit D and is made a part hereof by reference.

VI. A further contract as of the same date, to wit, May 2, 1919, was entered into between the plaintiff and the United States of America, represented by Captain William L. MacQuillan, Quartermaster Corps, United States Army, as con-

tracting officer, by which the plaintiff undertook to furnish labor, material, and equipment necessary to make further repairs in accordance with specifications to said contract attached, for the total sum of $1,200. The said work was to be begun by May 12, 1919, and to be completed by May 15, 1919. A copy of said agreement was attached to plaintiff's petition as Exhibit E and is made a part hereof by reference.

VII. Under date of May 8, 1919, a further contract was entered into between the plaintiff and the United States of America represented by Captain William L. MacQuillan, Quartermaster Corps, United States Army, as contracting officer, whereby the plaintiff undertook to furnish labor, material, and equipment necessary to make additional repairs in accordance with certain specifications attached to said contract for the total sum of $580. The said work was to be begun by May 8, 1919, and to be completed May 13, 1919. A copy of said contract was attached to plaintiff's petition as Exhibit F and is made a part hereof by reference.

VIII. The plaintiff completed the items of repair named in the original contract of March 28, 1919, 7 days beyond the time fixed in the extension agreement of May 2, 1919, and as a result thereof the defendant deducted from the said contract price the sum of $7,000 as liquidated damages.

IX. At the time of the delivery of the *Amphion* to the plaintiff, the said vessel was dirty, full of dunnage, ashes, trash, and filth. Approximately 5 days were required to put the ship into condition fit to have workmen engaged thereon. A further delay was experienced because of the presence of provisions belonging to the Shipping Board, together with a crew occupying quarters which made it impossible for the workmen to obtain access to certain of the compartments. Further delays were experienced because of the failure on the part of the defendant to deliver on time certain berths, clips, jack chains, service-station equipment, steam-cooking utensils, ovens, butcher blocks, meat grinders, ice machines, steam press, operating table, and steam sterilizer.

X. But for the failure of the Government to furnish said materials and supplies when required, and but for the fact that the said vessel was delivered in a condition not fit to start work immediately, and but for the defendant's failure to give the plaintiff full access to all of the ship compartments, the plaintiff could and would have completed the said work and delivered the vessel within the contract time.

XI. At the time when the repairs to the vessel were otherwise completed, the defendant ordered the plaintiff to install 9 additional ventilators, which it did at an added expense in the following particulars:

52 men—11 hours each—572 hours at 90¢ per hour	$514.80
9 ventilators, average cost $40 each	360.00
Paint and hardware for same	36.00
	910.80
Overhead 20%	182.06
1 foreman	10.00
	1,102.86

The court decided that plaintiff was entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

This case was argued and submitted with two other cases between the same parties, C–941 and C–942. The opinion in C–942, decided as of this date, is applicable to the issues involved herein. Under the ruling of the court in that case plaintiff is entitled to recover the sum of $7,000 deducted by the Government as liquidated damages from payments due plaintiff. It is further entitled to recover the sum of $1,102.86 for work and labor done in the installation upon said S. S. *Amphion* of nine ventilators not included in the original contract herein. See Finding XI.

Plaintiff is entitled to recover the sum of $8,102.86, and it is so adjudged and ordered.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

STATE OF RHODE ISLAND v. THE UNITED STATES

[No. E-355. Decided May 28, 1928]

On the Proofs

Special jurisdictional act of February 24, 1925; expenses of raising volunteer army in war with Spain; pay of volunteers; construction of State statute.—The statute of the State of Rhode Island, dealing with the pay of the militia in case of "insurrection, war, or imminent danger thereof," *construed* to authorize payment to the militia called out by the governor of that State in aiding the United States to raise a volunteer army in the war with Spain, at the rate of $1.50 per day for the first ten days and for each day in excess of ten days, 52 cents, the rate established for the United States Army.

The Reporter's statement of the case:

Messrs. Henry M. Foote and *V. B. Edwards* for the plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Shortly after the declaration of war by the United States against the Spanish Government in 1898, the State of Rhode Island, under the direction of its governor, mobilized the Organized Militia of said State and held the same in camp until most of its officers and enlisted men were mustered into the service of the United States.

II. The act of Congress approved July 8, 1898 (30 Stat. 730, 731), as amended by the act of Congress approved March 3, 1899 (30 Stat. 1356–1358), authorized the Secretary of the Treasury, after settlement upon vouchers to be filed with and passed upon by the accounting officers of that department, to pay to the governor of any State or Territory the reasonable cost, charges, and expenses that had been incurred by him in aiding the United States to raise the volunteer army in the then existing war with Spain, for subsisting, clothing, supplying, equipping, paying, and transporting men of his said State or Territory,

who were afterwards accepted into the volunteer army of the United States. Said acts were later amended by the act of Congress approved April 27, 1904 (33 Stat. 312), by enlarging the time in which the claim of any State might be preferred to January 1, 1906, and by authorizing the allowance of certain items of claim which had theretofore been disallowed by the accounting officers of the Treasury. Pursuant to the provisions of said acts, the State of Rhode Island presented a claim to the Comptroller of the Treasury in the total sum of $213,533.86, of which amount, upon consideration of the proofs submitted to him by said State, the comptroller allowed claims aggregating the sum of $129,047.97.

III. Subsequent to such allowance, an act of Congress approved June 7, 1906 (34 Stat. 214), entitled "An act for the relief of the State of Rhode Island," directed the Secretary of the Treasury to "resettle and readjust the claim of the State." Pursuant to the provisions of said act, the entire claim of the State of Rhode Island, including the items allowed and disallowed in said prior settlement, was again considered by the Comptroller of the Treasury and by decision dated February 12, 1907, as modified by decision dated November 8, 1907, further adjudication was made which allowed an additional sum of $32,022.88, making the total allowance to said State of $161,070.85.

IV. The pending suit was instituted pursuant to the provisions of an act of Congress approved February 24, 1925 (43 Stat. 964), providing:

"That the items of the claim of the State of Rhode Island against the United States for expenses incurred and paid in aiding the United States to raise its volunteer army in the war with Spain, which items, either in whole or in part, were rejected by the accounting officers of the Treasury Department, be, and the same are hereby, referred to the Court of Claims for adjudication and report to Congress."

V. The following certificate was executed by the Governor of Rhode Island, and made in connection with the supplemental claim of the State of Rhode Island for reimbursement under the act of June 7, 1906, 34 Stat. 214:

"I, George H. Utter, Governor of the State of Rhode Island, do hereby certify that, from the official records of the

State, and other evidence before me, I am able officially to state that the payments of money made by the State of Rhode Island, as explained, and for the purposes set forth in the foregoing vouchers and certificates attached thereto, viz: 31, 33, 55, 77, 78, 80, 89, 90, 93, 94, 95, 97, 98, 100, 168, 181, 185, 197, 186, 187, 191, 192, 193, 194, 367, 368, 369, 370, 198, 200, 201, 218, 226, 227, 231, 240, 250, 251, 252, 253, 261, 269, 274, 286, 294, 302, 303, 287, 288, 289, 291, 292, 293, 294, 295, 296, 297, 298, 304, 307, 309, 310, 311, 324, 330 to 357, 334, 359, 180, 184, 360, 501, 138, 363, 364, 373, 396, 479, 507, 508, 512, 604, 375, 380, 383, 399, 407, 408, 409, 410, 411, 414, 423, 424, 425, 432, 433, 444, 446, 455, 458, 465, 474, 475, 396, 479, 507, 508, 512, 604, 501, 502, 503, 504, 506, 511, 515, 517, 522, 523, 531, 532, 539, 545, 547, 551, 553, 554, 565, 566, 567, 568, 571, 577, 578, 579, 580, 581, 582, 583, 585 (6), 588, 590, 595, 600, 601, 603, 605, 611, 612, 617, 618, 621, 624, 625 to 640, 41, 43, 372, 189, and in second installment, Nos. 2, 3, 4, 5, 6, 7, 8, 9, were for the reasonable and necessary costs, charges, and expenses incurred by the governor of said State in aiding the United States to raise the Volunteer Army in the war with Spain by subsisting, clothing, supplying, equipping, paying, and transporting men of said State who were afterwards accepted into the Volunteer Army of the United States, and also for the comfort of said troops in camp or rendezvous, and for supplies which were used and equipments which were subsequently taken into the United States service by said volunteers, and for which no receipts were given; and also as payments to officers and men of the National Guard, or Militia, or Naval Reserves of the State who appeared at the rendezvous of the State for muster and were rejected by the medical examiner or mustering officer, and as further necessary, just, and reasonable payments for expenses incurred for the organization, maintenance, transportation, and comfort of troops raised by said governor and accepted into the service of the United States Army in said war with Spain, and which said items or parts thereof have been disallowed in the consideration of said claims for the reason that they appear to have been for stores furnished, or expenses incurred, or transportation furnished after the troops raised had been mustered into the service of the United States, and which expenses were incurred in good faith for the sole purpose of aiding the United States in the raising, organization, transportation, and equipment of troops so raised by said governor.

"And I do hereby further certify from the information derived as aforesaid, that as to those items, or parts thereof, which have been disallowed, or to which objections to the

payment thereof are now made by the United States, which are represented by the following vouchers viz, 77, 78, 93, 94, 95, 226, 227, 252, 334, 407, 408, 409, 410, 411, 465, 501, 504, 580, 581, 582, 583 and in second installment Nos. 25/26, and in the letter of the comptroller asking for explanation to certain vouchers, dated August 8, 1906, in vouchers Nos. 225, 26, 34, 47, 76, 103, 133, 209, 217, 229, 244, 262, 264, 331, 395, 406, 485, 490, 493, 503, 500, that the expenses represented by said vouchers were paid by the State of Rhode Island to the Organized Militia thereof, and to other persons, who under authority of the governor of said State, acted as his agents in aiding the United States to raise the Volunteer Army of the United States in the war with Spain, as hereinbefore set forth; and that inasmuch as two companies of said Volunteers of said State, after their muster into the service of the United States, remained at Camp Dyer, the State rendezvous, until the first day of August, 1898, before said rendezvous was turned over by the State to the United States, and thereafter till they were discharged, that any of said expenses paid subsequent to the muster of said troops into the service of the United States were for the organization, maintenance, and comfort of the same; that said expenses were necessary, just, and reasonable, and were incurred by said governor in good faith for the purposes aforesaid; the United States not having at the time any care or control of said camp, or of the supplies therein prior to said 1st day of August, 1898, and accepting said supplies furnished, and services by the State until said troops were mustered out of the service of the United States.

"(Signed) GEO. H. UTTER,
"*Governor of the State of Rhode Island.*"

VI. Plaintiff's amended petition specifies seven items in its claim. However, plaintiff has abandoned the one described as "seventh item of the claim." There are twenty-three vouchers to be considered in connection with the remaining six items of the claim, to wit, Nos. 77, 93, 226, 227, 231, 251, 252, 309, 310, 324, 407, 408, 409, 410, 411, 500, 501, 545, 580, 581, 582, 583, and 618. All of these vouchers, it will be seen, are included in and covered by the certificate of Governor Utter. (Finding V.)

VII. Said twenty-three vouchers are hereinafter considered under five separate schedules, indicated as Schedule I, Schedule II, Schedule III, Schedule IV, and Schedule V. Schedule V includes two of plaintiff's six claims.

The plaintiff and the comptroller have made quite different calculations as to the vouchers listed under the first four schedules. (As to the fifth schedule, the comptroller made no calculation.) The differences in such calculations arise from the construction of the rates of pay allowed by the laws of Rhode Island to its militia. Plaintiff claims $1.50 a day for service up to and including ten days and thereafter at the Regular Army rate. The comptroller claims that for all periods exceeding ten days the Regular Army pay should govern, and for those who served ten days or less the rate of $1.50 a day is proper.

VIII. Each of the first four schedules includes four columns, numbered, respectively, 1, 2, 3, and 4. Column 1 gives the number of and the amount claimed by each voucher; column 2 gives the result of the comptroller's computation, by applying his construction; column 3 gives the several amounts of said vouchers that were disallowed by the comptroller; and column 4 gives the results of the plaintiff's computation by applying its construction.

IX. *Schedule I.*—Amounts paid to the State militia for services prior to date of muster of troops into Federal service:

	Column 1	Column 2	Column 3	Column 4
77	$1,093.79	$551.47	$542.32	$973.87
93	64.29	44.13	20.16	60.93
226	624.00	473.00	151.00	529.80
251	507.38	174.75	332.63	426.83
252	49.50	21.72	27.78	38.52
407	108.00	40.48	67.52	62.40
408	24.00	11.52	12.48	19.32
409	603.84	295.52	308.32	615.80
227	1,347.30	810.64	536.66	1,220.10
410	1,319.50	661.48	658.02	930.08
411	547.86	256.46	291.40	526.88
500	264.00	207.84	56.16	267.42
501	1,910.98	920.98	990.00	1,206.96

Schedule II.—Compensation paid to State troops for services from assembly to muster:

	Column 1	Column 2	Column 3	Column 4
309	$13,918.57	$9,397.10	$4,521.47	$12,950.54
310	5,241.62	3,531.07	1,710.55	4,286.67

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Schedule III.—Compensation paid for services of rejected men from assembly to rejection:

	Column 1	Column 2	Column 3	Column 4
324	$4,156.00	$1,455.90	$2,700.10	$1,730.30

Schedule IV.—Payments made to band:

	Column 1	Column 2	Column 3	Column 4
231	$562.46	$132.12	$430.34	$337.92

Schedule V.—Payments to staff officers; also detail at hospitals:

	Column 3	Column 4
Voucher 545, hospital detail	$303.20	$303.20
Vouchers 580, 581, 582, 583, and 618, staff officers	4,482.38	4,482.38

The grand totals of column 2 (comptroller's computation) and column 4 (plaintiff's computation) in Schedules I, II, III, and IV show a balance in favor of plaintiff of $7,198.16. This total of $7,198.16, when added to the total of the two items carried in Schedule V, results in a total of $11,983.74, which is the sum claimed by plaintiff on account of the six items relied on in its amended petition.

X. The power of attorney under which the attorney for the State of Rhode Island is prosecuting the pending suit, purporting to have been signed by the general treasurer of the said State of Rhode Island on May 11, 1904, and purporting to have been authorized by a resolution of the general assembly of the said State, passed at the January session, 1904, as appears from the petition filed herein, reads in part as follows:

"*Resolved*, That the general treasurer is hereby authorized and empowered to appoint and employ an agent or agents in behalf of this State, at such compensation as he may determine, payable without further appropriation only out of any sums that may be collected hereunder, and with-

Opinion of the Court

out any liability on behalf of the State for any costs or expenses, to present, prosecute, and recover before the Congress, any department, the Court of Claims, or the Supreme Court of the United States, the costs, charges, and expenses properly incurred by this State for enrolling, equipping, and transporting its troops in the said war with Spain during the years 1898 and 1899.

"I, Walter A. Read, general treasurer of said State, have appointed H. M. Foote and V. B. Edwards, of Washington, D. C., agents of said State and in behalf of said State to prosecute and recover in the courts, departments, and Congress of the United States the claim of said State against the United States for enrolling, supplying, equipping, and transporting troops of said State for service in the war with Spain."

XI. There has been adduced no evidence herein except that which had been filed with and was before the Comptroller of the Treasury when that officer made the settlements hereinbefore referred to.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case arose out of a claim for expenditures by the authorized representatives of the State of Rhode Island in aiding the United States to raise a volunteer army in the Spanish-American War. The amounts expended by the State of Rhode Island are not in dispute. The act of Congress, 43 Stat. 964, referring the claim to this court, provides:

"That the items of the claim of the State of Rhode Island against the United States for expenses incurred and paid in aiding the United States to raise its volunteer army in the war with Spain, which items, either in whole or in part, were rejected by the accounting officers of the Treasury Department, be, and the same are hereby, referred to the Court of Claims for adjudication and report to Congress."

The act of Congress of July 8, 1898, 30 Stat. 730, authorized the reimbursement of the said State for its reasonable costs and expenditures incurred in aiding the United States to raise a volunteer army. The act of March 3, 1899, 30 Stat. 1356, authorized reimbursement for the purposes named

in the last act for expenses incurred as well after as before July 8, 1898, where the troops were accepted into the volunteer army, the rate of compensation for services to be based upon the allowances made by the law of the State to its militia according to grade. It also provided for reimbursement for the purchase of supplies and equipment, and necessary expenses for the comfort of the men in camp and rendezvous.

The act of April 27, 1904, 33 Stat. 312, provides that where the governor of a State or Territory has furnished military transportation, purchased or authorized the purchase of supplies, or incurred expenses for services rendered, and which purchases of supplies and expenses for military transportation and services rendered have been certified by the governor as necessary, just, and reasonable for the organization, maintenance, transportation, and comfort of the troops raised by him and accepted into the service of the United States Army in the Spanish-American War, the Secretary of the Treasury is authorized to allow such items or parts thereof as have been disallowed; and the certificate of the governor that such expenses were incurred in good faith, for the sole purpose of aiding the United States in the raising, organizing, transporting, and equipping of troops, shall be held to be sufficient to authorize the final settlement and payment in full of such claims.

The State presented a claim for $213,533.86, and under authority of the foregoing acts the Treasury Department allowed the sum of $129,047.97. Thereafter, under the provisions of the act of June 7, 1906, 34 Stat. 214, entitled "An act for the relief of the State of Rhode Island," and directing the Secretary to readjust the claim of the State, the Treasury Department reconsidered and readjusted the claim and allowed an additional sum of $32,022.88, making a total allowance of $161,070.85. This allowance was based upon a construction of the statute of Rhode Island dealing with the pay of the militia of that State, which is as follows:

"In case the militia, or any part thereof, shall be ordered out by the commander in chief for escort or other duty, like payments shall be made for duty so performed, provided such duty is not required to exceed ten days at any one time.

In case of insurrection, war, or imminent danger thereof, the military forces of the State when in actual service to exceed ten days shall be entitled to the same pay, rations, and allowances as are or shall hereafter be established by law for the Army of the United States.

"The like pay refers to $1.50 a day allowed for camp duty, pay to each member of a brigade, regiment, or company other than commissioned officers."

The question was how the men called out and employed by the State in its effort to raise a volunteer army should be paid under the terms of that statute, the act authorizing the payment having provided that they should be paid as the statute of the State prescribed. The comptroller construed the act to mean that where men had been in the service 10 days or less they were entitled to pay at the rate of $1.50 a day, that where they had been in the service more than 10 days, say 11 days, they were entitled only to the pay established by law for the Army of the United States; that is, that if a man had served 4 days he was entitled to $6.00; if he served 11 days he was entitled to $5.72.

The plaintiff contends that under the act where the service was for 10 days or less, the men were entitled to $1.50 a day; that where the service was for more than 10 days, the men were entitled to $1.50 a day for 10 days, and for each day in excess of 10 days, 52 cents, the rate established for the United States Army.

Without attempting extended discussion, it is a fair construction of the act to say that it was not intended that it should bring about any such incongruous situation or inharmonious result as that a man who served 4 days should receive more pay than a man who served 11 days. The act must be given a construction most conformable to reason and justice, and we are of opinion that the reasonable construction is that the State of Rhode Island should be compensated for payments made, on the basis of $1.50 a day for men serving 10 days or less, and where the service was more than 10 days, $1.50 a day for 10 days and 52 cents for each day in excess thereof.

This conclusion entitles the plaintiff to recover on the ground of said difference in pay a balance of $7,198.16.

The plaintiff should also be allowed to recover the further sum of $4,785.58 for payments to staff officers and details at hospitals, making a total of $11,983.74. All of the items embraced in these allowed balances were certified by the Governor of Rhode Island as necessary, just, and reasonable for the organization, maintenance, transportation, and comfort of the troops raised by him and accepted by the United States, and to have been incurred in good faith, for the sole purpose of aiding the United States in raising, organizing, transporting, equipping, and caring for said troops.

Let judgment be entered in favor of plaintiff for $11,983.74.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

ELLIS W. CRAIG v. THE UNITED STATES

[No. H-207. Decided May 28, 1928]

On the Proofs

Navy pay; retirement for age; sec. 1481, R. S.—A lieutenant in the Construction Corps of the Navy, who, having reached the age of 64 years and completed 43 years of service, was placed on the retired list with the rank of commodore, was entitled, under section 1481, Revised Statutes, as amended, to retirement as a commodore and to the pay of that rank.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Ellis W. Craig, was born on the 28th day of December, 1860, in Montgomery County, Maryland. On October 14, 1881, plaintiff entered the service of the United States Navy and served continuously therein as an officer

until December 28, 1924. On December 27, 1924, plaintiff held the rank of lieutenant in the Construction Corps of the Navy.

II. On or about November 20, 1924, the plaintiff received a letter from the Secretary of the Navy stating that "On December 28, 1924, you will have attained the statutory retirement age of sixty-four (64) years and will be transferred to the retired list of officers of the U. S. Navy from that date." On February 27, 1925, the plaintiff received another letter from the Secretary of the Navy stating: "You will regard yourself as having been placed on the retired list with the rank of commodore, in accordance with the provisions of section 1481 of the Revised Statutes, effective on December 28, 1924."

III. From December 28, 1924, until September 30, 1926, plaintiff was paid as a retired commodore at the rate of $375.00 per month. From October 1, 1926, to the present time, plaintiff has been paid as a retired lieutenant after thirty years' service at the rate of $281.25 per month, a reduction of $93.75 per month.

IV. Under date of December 4, 1926, the Secretary of the Navy addressed a letter to the Comptroller General of the United States in which the Secretary expressed the opinion that the plaintiff, Ellis W. Craig, was legally retired with the rank of commodore; that he now holds that rank in accordance with the law; and that he should therefore continue to be paid as a commodore on the retired list of the Construction Corps.

The court decided that plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This case depends upon the construction of section 1481 of the Revised Statutes, which reads as follows:

"Officers of the Medical, Pay, and Engineer Corps, chaplains, professors of mathematics, and constructors, who shall have served faithfully for forty-five years, shall, when retired, have the relative rank of commodore; and officers of these several corps who have been or shall be retired at the age of sixty-two years, before having served for forty-five years, but who shall have served faithfully until retired,

shall, on the completion of forty years from their entry into the service, have the relative rank of commodore."

This statute was amended by section 7 of the act of March 3, 1899, 30 Stat. 1006, which struck out the word "relative" where it appeared therein, so that whenever section 1481 was applicable, the rank of the officers referred to therein became on retirement that of commodore. Prior to the time of the retirement of plaintiff, this statute was further amended by changing the age for retirement from sixty-two to sixty-four years.

It will be observed that the statute as thus amended containing two provisions: The first referring to certain officers who when retired shall have served forty-five years; the second to officers retired at the age of sixty-four years, who had not served for forty-five years, but who had completed forty years of service. The case of the plaintiff is based upon the second provision.

It appears that by order of the Secretary of the Navy, contained in a letter, the plaintiff was, as of date of December 28, 1924, transferred from the active service to the retired list. At that date the plaintiff had attained his sixty-fourth birthday and had served more than forty years. Subsequently, by a letter dated February 24, 1925, he was recognized as commodore by the Secretary of the Navy. Both of these letters are set out in Finding II.

The evidence shows that he received the pay of a retired commodore from the date of his retirement, December 28, 1924, until September 30, 1926. From October 1, 1926, pursuant to a ruling made by the Comptroller General, his pay was reduced to that of a retired lieutenant, and he has continued to receive it on that basis. The reduction in his pay amounts to $93.75 per month, and he asks judgment for the amount of the difference in pay from October 1, 1926, up to the present time.

The defendant appears to rely principally upon the Navy personnel act of March 3, 1899, 30 Stat. 1004. Section 8 thereof contains a provision quoted by the defendant for the retirement of lieutenant commanders and officers above that rank with the "rank and three-fourths the sea pay of the next higher grade as now existing, including grade of com-

modore." An examination of this section shows very clearly that it has no application to officers retired by reason of age, but on the contrary applies to officers who voluntarily retired in accordance with its terms.

The defendant also refers to a provision contained in section 13 of the same act reading, "that no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced, he shall continue to receive pay according to existing law." Whether this provision had any application to the cases of officers retired on account of age it is not necessary to determine herein. It is plain that it does not change the status of the plaintiff in the least. In passing, however, it should be noted that the main purpose of the Navy personnel act was to reduce the number of officers in certain of the higher grades of the Navy by providing a method of voluntary retirement and also a method of compulsory retirement under the operations of what has been commonly known as the "Plucking Board." This statute had one general provision to which reference has heretofore been made. In section 7 of the act it was stated "that all sections of the revised statutes which in defining the rank of officers or positions in the Navy contain the words 'the relative rank of' are hereby amended so as to read 'the rank of.'" This language is contained in a proviso and is so plain as to need no comment.

The defendant also relies on the language of the act of August 5, 1882, 22 Stat. 286, which provides:

"Hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired."

This act merely prevents promotion or increase of pay in the retired list after an officer has been retired. It has been so construed by the Attorney General (32 Op. Atty. Gen. 406, January 28, 1921). Before its enactment, officers to whom section 1481 applied, who had not served forty years when retired, could after retirement be promoted to the rank of

commodore on reaching that age. It has no application to the case of the plaintiff who had served forty years before being retired and who was retired at the grade of commodore without any subsequent promotion.

Some other statutory provisions are mentioned in defendant's brief, but it is not claimed that any of them amended or changed in any way the effect of section 1481 under which plaintiff was retired.

It is contended on behalf of the defendant that to so construe section 1481 as to raise the grade of an officer upon retirement from that of lieutenant to commodore gives to this statute such an unreasonable effect that it can not be assumed that Congress intended such a result. The terms, however, of the law are clear and unmistakable. There is no ambiguity in the statute and this court can not pass upon the question of its advisability. On this point the case of *Bartlett* v. *United States*, 59 C. Cls. 192, has some bearing. In that case it appeared that Bartlett had passed through different grades to that of lieutenant commander, and having reached the age of sixty-four, was retired with the grade and pay of captain. Claiming that he was entitled to the grade and pay of commodore upon his retirement, he brought suit for the difference in his pay. This court said in rendering its opinion upon the case:

"Under the provisions of the act of March 3, 1871, R. S., sec. 1481, there is no question that the plaintiff is entitled to be retired with the rank and pay of commodore."

On the whole, an examination of the amendments and changes made in the law shows, as it did in the *Bartlett case*, that the application of section 1481 to the plaintiff's case has not been altered thereby.

We find that the plaintiff was entitled to be retired with the grade of commodore and to receive the pay of such grade. It follows that he is entitled to recover the difference between what has been paid him and the pay of that grade, and judgment will be rendered accordingly.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

SINCLAIR COAL CO. v. THE UNITED STATES

[No. E-571. Decided May 28, 1928]

On the Proofs

Contract for coal; delivery "as called for"; breach.—Where a Government contract for coal provides for delivery "as called for," and the entire tonnage specified in the contract is duly covered by calls, an order by the Government to cease deliveries and a refusal by it to accept the balance constitute a breach for which the contractor can recover damages.

Same; sales agent; change in price according to wages; ascertainment of damages for breach.—Where a contract for coal to be furnished the Government is with a sales agent, and it is agreed that the contract price is to be increased or decreased according to increase or decrease in wages, the contractor, in the ascertainment of damages for refusal to take the entire quantity contracted for, is entitled to the benefit of a wage increase in effect at time of breach.

The Reporter's statement of the case:

Mr. Josephus Trimble for the plaintiff. *Mr. David L. Sheffrey*, and *Matthews & Trimble* and *Winger, Reeder, Barker, Gumbiner & Hazard* were on the briefs.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Sinclair Coal Company, is now, and was during all of the times hereinafter mentioned, a corporation duly organized and existing under the laws of the State of Missouri, with its principal place of business and office in Kansas City, Missouri.

II. On or about August 15, 1920, plaintiff entered into a formal contract with 1st Lieut. Hal. T. Viger, Q. M. C., United States Army, acting under authority of the Quartermaster General of the United States Army, and under direction of the Secretary of War, for and in behalf of the United States, by the terms of which plaintiff agreed to deliver to the Government at Fort Leavenworth, Kansas, as called for on or before June 30, 1921, 34,814 tons of bitumi-

nous coal taken from the mines at Hume, Missouri, at the unit price of $4.50 per ton, or a total price of $156,663. Said contract was numbered 2639 and dated July 1, 1920, but was in truth and in fact executed on or about August 15, 1920. A true copy of said contract is attached to the petition, marked "Exhibit A," and is made a part of these findings by reference.

III. Under date of August 5, 1920, which was ten or fifteen days before the formal contract was executed, H. E. Comstock, lieut. colonel, Q. M. C., issued two calls to plaintiff corporation, one for 17,500 tons and one for 17,314 tons. Each call provided that deliveries were to commence at once, to be continued at the rate of ten cars per day until completed, making the rate of deliveries under both calls twenty cars per day. The two calls comprised the entire tonnage contracted for and covered by the formal contract. Promptly upon receipt of said calls, and before the execution of the contract, plaintiff commenced delivery of the coal. Delivery was continued at the rate of about eight cars per day until on or about September 9, 1920, when the mines from which plaintiff obtained the coal were compelled to close for ten days on account of unusually heavy rains, which filled the mine pits with water to a depth of from ten to forty feet. Plaintiff advised the defendant of the condition of the mines, caused by the heavy rains. After the mines resumed operation, following the flooded condition, deliveries of coal went forward at the rate of 1⅓ cars per day. Larger deliveries could and would have been made by plaintiff except for a car shortage. Plaintiff made requests to the Quartermaster's Department for assistance in securing an adequate supply of cars so that the coal could be delivered. The Hume mines are located on the Kansas City Southern Railway, and the officers of the defendant requested the Frisco Railway Company, which did not operate through Hume, Missouri, to supply cars to the Kansas City Southern Railway Company to relieve the shortage, but this request was not complied with.

Plaintiff was further handicapped in delivery of coal by a strike which occurred at the mines at Hume, Missouri, on

or about the 29th day of October, 1920, which lasted for seven or eight days. Plaintiff at the time notified the defendant of the occurrence of the strike.

The delivery of the coal under the contract was continued under the handicaps and difficulties above mentioned until the 17th day of December, 1920, when Lieut. Flynn, of the Quartermaster Corps, verbally advised plaintiff that the railroad yards at Fort Leavenworth had become so congested that no more coal could be received. The embargo lasted until January 15, 1921, and was caused by overshipment of coal to the camp at Fort Leavenworth by other coal operators. Following the verbal notice to discontinue shipments of coal under date of December 20, 1920, Major Reuben C. Taylor, Q. M. C., wrote plaintiff as follows:

ST. LOUIS, MO.,
Dec. 20, 1920.

From: Office, Depot Quartermaster, St. Louis, Mo.
To: Sinclair Coal Co., Kansas City, Mo.
Subject: Contract No. 2639.
Address reply "Attention Desk #8."

1. Replying to your communication, December 17th, regarding the coal for Ft. Leavenworth on contract 2639, shipments of which you were requested to temporarily discontinue and against which the railroad company has issued embargo, you are informed that this coal contract, as well as any others placed for this post, was made by the Quartermaster General's office, Washington, and this office is not responsible for overshipments being received at Ft. Leavenworth, nor for the action of the railroad company. It is regretted if this has caused you any inconvenience, but this office can only refer the matter to the Quartermaster General's office, from whence contracts emanated, for instructions, which action has been taken this date.

2. As soon as reply is received from Washington you will be informed.

3. For your information it should be stated that shipments on all coal contracts for Ft. Leavenworth have been requested to be stopped until freight congestion existing at that point is relieved. Other contractors also have objected to this procedure, but this depot was obliged to refer each case to Washington for decision.

By direction:

(Signed) REUBEN C. TAYLOR,
Major, Q. M. Corps, Assistant.

IV. During the time that the contract was in the course of performance, before the date of the embargo at Fort Leavenworth, there was more or less misunderstanding between the plaintiff and the Quartermaster General's Department as to the rate at which deliveries were to be made. At one time the Quartermaster General requested shipments of twenty cars per day. Plaintiff protested against this action and called the attention of the Quartermaster General's Department to the fact that previous to the execution of the contract and under date of August 2, 1920, Rogers, Quartermaster General, wired plaintiff asking advice as to location of mines and also rating of cars; and that on August 3, 1920, plaintiff replied to this wire and stated that the mines were located at Hume, Missouri, and that they had a rating of eight cars per day.

Under date of September 7, 1920, the Quartermaster's Department wired plaintiff as follows:

FT. LEAVENWORTH, KANSAS.

SINCLAIR COAL COMPANY,
Kansas City, Mo.:

Coal not being received in sufficient quantities to meet requirements request that you expedite shipments require at least five cars per day, answer by telegraph.

COMSTOCK, *Q. M.*

Under date of September 28, 1920, the quartermaster at St. Louis, Missouri, wrote plaintiff that the camp was in urgent need of fuel, and requested that plaintiff advise him as to the cause of delay in making shipments under the contract.

Under date of October 11, 1920, Major Taylor wrote plaintiff as follows:

ST. LOUIS, MO., *October 11, 1920.*

From: Depot Quartermaster, St. Louis, Mo.
To: Sinclair Coal Company, Kansas City, Mo.
Subject: Coal—Ft. Leavenworth, Kansas.

1. Reference this office letter to you dated September 28th, and your reply of succeeding day, your attention is again invited to coal situation prevailing at Ft. Leavenworth.

2. This office's records show that up to the present time you have shipped 39 cars coal, applying against contract 2639, whereas if shipments had been made as called for there should have been shipped approximately 800 cars. Of course,

it is understood that your deliveries have been hindered by lack of cars, mine trouble, etc., but it would appear that your firm could make much better deliveries than those of the past fifty days. Your average daily delivery for September was about 1⅓ cars.

3. In view of the urgent current requirements of Fort Leavenworth it is again requested that you make special effort to ship on this contract as near as possible in accordance with quantity specified on calls, but at least not less than five (5) or six (6) cars per day should go forward to this post.

4. Acknowledgment is desired, stating what has been accomplished to date and what may be anticipated in future.

By direction:

(Signed) REUBEN C. TAYLOR,
Major, Q. M. C., Assistant.

After the embargo was lifted, or on February 25, defendant requested plaintiff to ship coal at the rate of four cars per day until the contract was completed. Plaintiff agreed to comply with this request and did ship coal at the rate of four cars per day. On February 16, 1921, defendant advised plaintiff that Fort Leavenworth was then in a position to handle eight cars per day and requested plaintiff to ship in accordance therewith. On the following day, February 17, 1921, plaintiff addressed a letter to the depot quartermaster stating that it would be more than glad to make shipments of eight cars per day.

V. Under date of March 1 Major Stayton sent plaintiff the following letter:

CHICAGO, ILL., *March 1, 1921.*

From: Quartermaster Supply Officer, Purchase Division, Chicago, Ill.
To: Sinclair Coal Company, Kansas City, Mo.
Subject: Contract 2639.

1. It is requested that coal shipments on above contract to quartermaster, Ft. Leavenworth, Kansas, be discontinued until further notice from this office.

2. It is further requested that this office be advised total number of tons of coal delivered on contract to date.

By authority of the quartermaster supply officer.

(Signed) NORRIS STAYTON,
Major, Quartermaster Corps.

On March 2 plaintiff replied to this letter and inquired whether the letter of March 1 was to be considered a cancellation of the contract. Under date of March 4, 1921, Major Stayton sent plaintiff the following letter:

CHICAGO, ILL., *March 4, 1921.*

From: Quartermaster Supply Officer, Purchase Division, Chicago, Ill.
To: Sinclair Coal Company, Kansas City, Mo.
Subject: Contract 2639.

1. Receipt is acknowledged of your letter dated March 2.
2. This office is in receipt of a letter from the quartermaster, Ft. Leavenworth, Kansas, stating that coal is no longer required on above contract.
3. If coal should be needed before expiration date, June 30, 1921, you will be called upon to make delivery on above contract.
4. It is requested this office be advised the number of tons of coal shipped on contract to date.

By authority of the Quartermaster Supply Officer.

(Signed) NORRIS STAYTON,
Major, Quartermaster Corps.

Plaintiff protested against the suspension of deliveries, and under date of March 28 Colonel Hacker wrote plaintiff as follows:

WASHINGTON, D. C., *March 28, 1921.*

From: Quartermaster General.
To: Sinclair Coal Company, Kansas City, Mo.
Subject: Contract #2639.

1. Reference yours of March 17th, you are advised that if you have a claim against the Government which requires an equitable adjustment you should forward same to the Auditor for the War Department through this office.
2. As to our advising you that there will be no more coal called for on your contract, it was our understanding that you had been so advised. If you have not, this office will take up this matter with the quartermaster supply officer, St. Louis, Mo., who will take such action as he deems necessary.

By authority of the Quartermaster General:

(Signed) T. B. HACKER,
Colonel, Q. M. Corps.

Upon receipt of the above letters plaintiff did not attempt to sell its coal elsewhere, but held itself in readiness to per-

form the contract, and was in a position to and able to produce and deliver coal at the rate of five to eight cars per day. On March 28 plaintiff had approximately 3,000 tons of coal actually uncovered and ready for loading on the cars.

VI. Plaintiff was not the producer of the coal specified in the contract, but was engaged in the business of selling coal, and was the sales agent of the Klaner mines at Hume, Missouri, from which the coal was to be obtained. The plaintiff operated under contract with the Klaner mines on a commission basis.

VII. In the early part of August, 1920, plaintiff made application for a wage increase under the provisions of the contract, and defendant, after sending a representative to check and verify the same, granted and allowed the wage increase on the 16th day of August, 1920, in the amount of $.33875 per ton.

VIII. The total tonnage of coal delivered by plaintiff and received by the defendant under the contract was 16,659.8 tons. The balance due and undelivered under the contract was 18,154.2 tons. All of the coal so delivered and received, including the wage increase allowed and granted, was paid for by the defendant.

IX. On March 2, 1921, the date deliveries under the contract were suspended by the defendant, the fair market value of Hume 1¼″ lump coal f. o. b. the mines was $1.75 per ton. The market value of the 18,154.2 tons of coal undelivered was $31,769.85.

The original price per ton named in the contract was $4.50. On the 18,154.2 tons of coal undelivered this amounted to $81,693.90, and the difference between that amount and the aforesaid fair market value was $49,924.05.

The wage increase was $.33875 per ton and this, added to the original contract price of $4.50, gives an increased price of $4.83875 per ton. The difference between this increased price and the aforesaid market value, on the tonnage undelivered, is $56,073.79.

The court decided that plaintiff was entitled to recover.

Opinion of the Court

GRAHAM, *Judge*, delivered the opinion of the court:

This case involves a contract, dated July 1, 1920, for supplying coal to the Government at Fort Leavenworth, Kans. The contract provides:

"The contractor shall furnish and deliver to the United States, and the United States shall accept and pay for, the articles of work described, and upon the terms and conditions set forth in Schedule 'A,' attached hereto and by reference made part hereof."

Schedule "A," among other things, provides:

"Schedule of Del.: As called for on or before June 30, 1921, by Depot Quartermaster, Fort Leavenworth, Kans."

and contains the further provision:

"At the expiration of this contract any undelivered material not covered by calls will be automatically cancelled."

These two provisions of this schedule are not found in the schedule in the *Burton Coal Co. case*, 60 C. Cls. 294, 273 U. S. 337, but the body of the contract is the same as in that case, and contains the following clause, which was in the contracts in both of these cases:

"Section 2. *Termination in Public Interest.*—If, in the opinion of the Quartermaster General, the public interest shall so require, this contract may be terminated by the United States by 15 days' notice in writing from the contracting officer to the contractor, and such termination shall be deemed to be effective upon the expiration of 15 days after the giving of such notice."

After the date of the contract, but before its execution, the defendant called for the delivery of all of the coal covered by the contract. The defendant thus waived its rights under the two provisions of the contract above recited as to the cancellation of the undelivered coal at the expiration of the contract and the delivery of the coal as called for, and became liable to take all of the coal called for by the contract. It breached the contract by ordering the plaintiff to cease deliveries and its refusal to accept the balance of the coal, and under the decision in the *Burton Coal Co. case*, *supra*, it is liable for such damage as the plaintiff suffered by reason of the breach.

A few days after the execution of the contract the plaintiff claimed, and the defendant allowed, a wage increase, as provided in paragraph 19a of the contract, which is as follows:

"Paragraph 19a.—Prices submitted shall be on the recognized scale of wages for the district in which the mine or mines from which the coal is to be furnished may be located. It is agreed that if at any time during the continuance of the contract the wages so paid for the particular district are increased or decreased the prices agreed upon and provided for in the contract shall be increased or decreased accordingly."

As this was a contract of purchase, the plaintiff being a mere dealer in coal, buying and selling, and not a mine owner or a producer, it must be held that this wage addition became a part of the contract price to be taken as the basis in estimating the plaintiff's damage, which is the difference between the contract price and the fair market price at the date of the breach at the place of delivery. See *Kellogg and Markham*, etc., v. *United States*, No. F-147, this day decided (*post*, p. 717), for further discussion of this question.

The question has been raised that the plaintiff was in default in the delivery of coal as ordered, and had thereby failed to comply with its contract. The failure to supply coal as called for was due to causes which the contract provides should not be treated as defaults upon the part of the plaintiff, and therefore can not be treated as a bar to its recovery.

The plaintiff is entitled to a judgment in the sum of $56,073.79, and it is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

PETER SHIELDS v. THE UNITED STATES

[No. F-125. Decided May 28, 1928]

On the Proofs

Eminent domain; just compensation; encumbrances.—Just compensation for the taking of property under the act of October 6, 1917, as amended by the act of July 1, 1918, determined and

allowed, and judgment suspended until plaintiff files releases of encumbrances.

The Reporter's statement of the case:

Mr. John A. Beck for the plaintiff.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, Peter Shields, is now, and was during all of the times hereinafter mentioned, a citizen of the United States, residing in the city of Washington, District of Columbia.

II. On December 2, 1918, plaintiff was the sole owner of thirty-six lots in the city of Cape May, New Jersey, more particularly described as follows:

Parcel 1: Lots 7412, 7413, 7414, 7415, 7418, 7419, 7420, 7426, 7427, 7428, 7429, 7431, 7432, 7433, 7434, 7435, 7436, 7437, 7438, 7439, 7440, 7441, 7443, 7444, 7445, 7451, 7452, 7453, 7454, 7458, 7459, 7460, 7461, on Plan A of the map of the Cape May Real Estate Company, recorded in the office of the clerk of the county of Cape May, New Jersey, in Plan Book No. 1, pages 31 and 32.

Parcel 2: Lots 7455, 7456, and 7457, on Plan A of the map of the Cape May Real Estate Company recorded as in parcel 1 above.

Nineteen of said lots were on Beach Avenue and seventeen of said lots were on New Jersey Avenue.

III. Pursuant to the provisions of the act of Congress approved October 6, 1917, 40 Stat. 344, entitled "An act to provide for the acquisition of an air station for the United States Navy," as amended by act of Congress approved July 1, 1918, 40 Stat. 704, the President of the United States, being therein authorized to take over and appropriate for the United States such lands as he deemed necessary for such air station, issued and published a proclamation, dated December 2, 1918, 40 Stat. 1912, by which he did take over and appropriate for the United States for such public use all of the right, title, possession, improvements, and other

rights appurtenant thereto in and to all of the lands located within the corporate limits of the city of Cape May, New Jersey, as were situate and lying east of the west line of Yale Avenue and bounded on the south by the Atlantic Ocean, on the east by Cold Spring Inlet, and on the north by Cold Spring Harbor, excepting lots numbered 7233, 7234, 7235, and 7236, then owned by the United States, all comprising about 349 acres of land. Whereupon the aforesaid premises, as described in the President's proclamation aforesaid, were immediately reduced to the permanent control and possession of the United States, and at all times since have been exclusively used for a naval air station. A copy of the aforesaid proclamation, omitting its quotation of the provisions of the aforesaid acts of Congress, is attached as Exhibit A to the plaintiff's petition and is made a part of this finding by reference. The aforesaid area thus taken over by the United States embraced and included the plaintiff's aforesaid thirty-six lots and parcels of land as described in Finding II.

IV. Pursuant to the provisions of the aforesaid act of Congress of July 1, 1918, the President of the United States, acting through the Secretary of the Navy, determined the sum of $22,225 to be the amount of just compensation due from the United States to the plaintiff for his aforesaid thirty-six lots. A notice of the President's aforesaid award and determination of just compensation was delivered to the plaintiff on or about September 8, 1921. Thereafter and on September 12, 1921, the plaintiff notified the United States that the sum of $22,225 was unsatisfactory in amount and thereupon demanded of the United States the immediate payment of a seventy-five per cent part thereof, or the sum of $16,668.75.

V. No part of said award or any other amount has been paid to plaintiff as just compensation for the taking of said property.

VI. On December 2, 1918, plaintiff's thirty-six lots were subject to the following encumbrances of record:

(a) Mortgage to German Savings & Deposit Bank dated October 20, 1909, recorded in Deed Book 90, folio 278, conveying lots 7434, 7435, 7436, 7460, and 7461 for $80,000.

(b) Mortgage to German Savings & Deposit Bank dated August 14, 1912, recorded in Deed Book 109, folio 145, conveying lots 7458 and 7459 for $9,100.

(c) Mortgage to Edward H. Jennings dated March 28, 1914, recorded in Deed Book 128, folio 259, conveying lots 7455, 7456, and 7457 for $5,000.

(d) Mortgage to Mary E. Scully and John S. Scully dated March 15, 1915, recorded in Deed Book 131, folio 337, conveying lots 7412 to 7420 and 7437 to 7445 for $50,000. The amount of this mortgage has been reduced by payment to the holders thereof, leaving a balance as of date hereof due and payable thereon of $5,000 and accrued interest.

(e) Mortgage to Annie Sullivan dated June 29, 1915, recorded in Deed Book 133, folio 132, conveying lots 7451 to 7454 and 7426 to 7429 for $20,000.

(f) Mortgage to John W. Painter dated August 7, 1915, recorded in Deed Book 136, folio 435, conveying lot 7473 and the east one-half of lot 7444, and also lot 7418 and east one-half of lot 7419, for $5,000.

(g) Mortgage to Arthur Pollard dated August 7, 1915, recorded in Deed Book 136, folio 438, conveying lot 7445 and the west one-half of 7444, and lot 7420 and the west one-half of lot 7419, for $5,000.

(h) Judgment to Edward H. Jennings dated October 21, 1915, recorded in Circuit Court of Cape May County, Docket F, folio 187, being a lien on lots 7416, 7417, 7430, 7431, 7432, 7433, and 7442 for $4,422.06.

(i) Judgment to John S. Unger, trustee, dated August 28, 1918, recorded in New Jersey Supreme Court Judgment Docket No. 11, folio 216, in the amount of $6,187.90.

(j) Judgment to Third National Bank of Philadelphia dated September 23, 1918, recorded in New Jersey Supreme Court Judgment Docket No. 11, folio 235, in the amount of $11,370.33.

(k) Tax deed to city of Cape May dated September 22, 1919, recorded in Mortgage Book 160, folio 184, conveying lots 7459, 7460, and 7461 for $50.85.

VII. On December 2, 1918, the fair and reasonable market value of the thirty-six lots owned by plaintiff, the same being

the lots described in Finding II hereof, was the sum of $51,150.00.

The court decided that the plaintiff was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

The only question for determination in this case is the fair market value of the property taken as of the date of the taking, December 2, 1918. The board of valuation of commandeered property, after investigation, made an award in the sum of $22,225 as the amount of just compensation due from the United States to plaintiff for the thirty-six lots taken. Being dissatisfied with the award, plaintiff requested the payment of 75 per cent of same. No part of the award has been paid.

The record in this case is a tragical history of a pleasure resort which failed to materialize. Plaintiff's evidence as to values seems to reflect the hopeful attitude of the witnesses toward the future development of this resort rather than the actual fair value of the land at the time it was taken. These values did not exist on December 2, 1918, and have never existed. The commissioner held hearings at the site of the property and has found the fair and reasonable market value of same to be $51,150 as of December 2, 1918, which the court believes fairly represents the true and correct value. Plaintiff is entitled to recover said sum with interest at the rate of 6 per cent per annum from December 2, 1918, until paid. The payment of this judgment, however, will be suspended until plaintiff shall file in this court proper releases of the encumbrances set forth in Finding VI.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

H. G. KELLOGG AND C. H. MARKHAM, INDIVIDUALLY AND AS COPARTNERS, TRADING UNDER THE FIRM NAME AND STLYE OF THE MIDLAND COAL CO., v. THE UNITED STATES

[No. F-147. Decided May 28, 1928]

On the Proofs

Contract for coal; delivery "as called for"; breach.—See *Sinclair Coal Co.* v. *United States, ante*, p. 704.

Same; sales agent; change in price according to wages; ascertainment of damages for breach.—*Id.*

The Reporter's statement of the case:

Mr. David L. Sheffrey for the plaintiffs. *Mathews & Trimble* and *Winger, Reeder, Barker, Gumbiner & Hazard* were on the briefs.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiffs, H. G. Kellogg and C. H. Markham, are now, and were at all times hereinafter mentioned, partners doing business under the firm name and style of the Midland Coal Company, with their office and principal place of business in Kansas City, Missouri.

II. Under date of May 8, 1920, plaintiff company submitted its written proposal to the director of purchase, regular supply division, United States Army, wherein plaintiff company proposed to furnish to the Government of the United States for delivery at Camp Funston, Kansas, 38,960 tons run-of-mine through 1½″ bar screen coal at and for the price of $2.65 per ton f. o. b. cars at billing point; also 19,480 tons over 6″ bar screen coal at and for the price of $3.90 per ton. Said proposal contained the following provisions:

"Contract to be entered into only in case we are given proper proportion of both lump and screenings."

also

"Run-of-mine through 1½″ bar screen equal to 2½″ round hole. Lump coal over 6″ bar screen. Shipments of

screenings restricted to 4,500 tons in any one month. Shipments of lump restricted to 2,500 tons in any one month."

III. Under date of June 15, 1920, the following telegram was sent to plaintiff company:

"On bids opened in this office under date of May fourteenth you were awarded the following tonnage period four thousand tons bituminous coal at Fort Leavenworth nineteen thousand four hundred eighty Camp Funston eighteen thousand nine hundred sixty bituminous run mine Camp Funston fifteen hundred Fort Omaha period Regular contract follows Acknowledge receipt by wire J 880 6 p. m.

ROGERS, *Quartermaster Genl.*"

Under date of June 16, 1920, plaintiff company replied to the above telegram by letter in part as follows:

"We wired you as follows to-day:
'Your night wire fifteenth. Will accept contracts mentioned if made strictly in accordance with our bids.'"

Under date of June 22, 1920, the following letter was sent to plaintiff company:

WASHINGTON, D. C., *June 22, 1920.*

MIDLAND COAL COMPANY,
Kansas City, Missouri.

GENTLEMEN: Reference is made to your letter of June 16th regarding certain tonnages which have been awarded you on bids opened in this office under date of May 14th, for supplying coal to the United States Army for the fiscal year 1921.

As stated in our telegram of June 15th you were awarded 4,000 tons of lump over six-inch screen (bar), instead of five-inch, as was stated in your letter, inasmuch as bids submitted by you specified over six-inch bar screen. The 19,480 tons of lump was also over six-inch bar screen, and the 18,960 tons of R/M was through 1½" bar screen. The 1,500 tons for Omaha was straight R/M.

The supply officers at posts for which you have been awarded tonnage will be furnished with a copy of your letter in order that equal monthly tonnage may be called for throughout the contract period, as stipulated in your bid.

By authority of the Quartermaster General, Director of Purchase & Storage.

(Signed) C. A. DRAVO,
Captain, Quartermaster Corps,
Chief, Raw Materials & Paints Branch.

IV. On or about 4th of August, 1920, the formal contract dated July 1, 1920, was forwarded to plaintiff company for signature, which signature was affixed thereto on or about the 15th of August. The United States was represented in the execution of said contract by Captain J. A. Lester, Q. M. C., United States Army. Said contract was numbered 2519. By the terms of the contract plaintiff company agreed to deliver to the defendant 28,440 tons of coal as follows:

18,960 tons of run-of-mine coal at $2.65 per ton, and 9,480 tons of lump coal at $3.90 per ton, or a total consideration of $87,216 for said 28,440 tons f. o. b. mines, Youngstown, Missouri. The price per ton was to be subject to wage increases or decreases. It was further provided that the coal to be furnished thereunder was to be delivered "as called for by the supply officers on or before June 30, 1921, of Camp Funston, Kansas."

A true copy of said contract is filed with plaintiff's petition, marked "Exhibit A," and is made a part of these findings by reference.

V. Under date of July 20, 1920, the Camp Quartermaster, Wm. H. Tobin, Lieut. Col. C. A. C., issued two calls to plaintiff company for the delivery of coal at Camp Funston, one call for 18,960 tons run-of-mine through 1½" bar screen, at $2.65, shipments to begin at once at the rate of five cars per week until further notice, and one call for 19,480 tons bituminous lump over 6" bar screen at $3.90 per ton, shipments to begin September 1, 1920, at the rate of ten cars per week until further notice. Plaintiff company immediately notified the Quartermaster General that the calls for coal were not in accordance with plaintiff company's proposal in that the calls provided for deliveries of ten cars per week of lump coal and five cars per week of run-of-mine coal. Under dates of August 26 and August 30, 1920, respectively, the Assistant Quartermaster General sent plaintiff company the following letters:

St. Louis, Mo. *August 26, 1920.*

From: Depot Quartermaster, St. Louis, Mo.
To: Midland Coal Company, Kansas City, Mo.
Subject: Contract No. 2519.

1. Enclosed herewith call issued by the camp quartermaster, Camp Funston, for 18,960 tons of coal, bituminous, run of mine through 1½″ bar screen shipments to begin at once at the rate of ten cars per week until further notice.

2. Call for the bituminous coal, lump, over 6″ bar screen, will be forwarded you within a few days.

3. These calls referred to above nullify previous calls made by Camp Funston on this contract, No. 2519.

4. It is requested that every effort be made by you to make shipments to Camp Funston in accordance with call. You are further requested to supply camp quartermaster with sworn weighmaster's certificate showing weight at point of origin on every car shipped, together with the original commercial B/L for conversion into Government B/L. Memorandum copy of commercial B/L should be forwarded to this office. Your invoice, in triplicate, is to be forwarded to the finance officer, U. S. A., St. Louis, Missouri. Prompt transmittal of all of the papers referred to above will expedite payment of your invoices.

By direction:

(Signed) Reuben C. Taylor,
Major, Q. M. Corps, Assistant.

War Department,
Office of the Depot Quartermaster,
General Supply Depot,
Second & Arsenal Sts., St. Louis, Mo., August 30, 1920.

From: Depot Quartermaster.
To: Midland Coal Co., Kansas City, Mo.
Subject: Call—bituminous lump coal.

1. Enclosed herewith call issued by Camp Funston for 9,480 tons of coal, bituminous, over 6″ bar screen, to be delivered at the rate of 5 cars per week until further notice.

2. Request that every effort possible be made to ship coal in accordance with this call.

By direction:

(Signed) Reuben C. Taylor,
Major Q. M. Corps, Assistant.

VI. Subsequent to August 26, 1920, other calls for coal were made and plaintiff company began the performance of its contract. From time to time certain disputes arose as to the amount of tonnage that was to be shipped and on

two different occasions it was contended by the Government that the coal shipped was not of the quality contracted for. In the month of October the quartermaster at Camp Funston refused to accept a certain shipment of ten cars of run-of-mine coal which had been delivered to that post, and temporarily suspended deliveries of run-of-mine coal. Much correspondence passed between the parties as a result of these disputes. Plaintiff company's assistant sales manager made a trip to Camp Funston and there held a conference with Major Luberoff. Following this conference all of the coal that had been shipped by plaintiff company was accepted and paid for by the Government, and on November 24 Major Luberoff wired plaintiff that the suspension in deliveries of the run-of-mine coal was removed and requested plaintiff to resume shipments of run-of-mine coal at the rate of seven cars per day.

No notice was received by plaintiff company to discontinue the shipments of lump coal, and lump coal was delivered during the period that the deliveries of run-of-mine coal were suspended. A call for the delivery of lump coal for the month of December, 1920, was made under date of November 13, 1920, and plaintiff company was notified that a call for delivery during January would be made on December 1. Under date of November 24 a call was made for deliveries of run-of-mine coal during the month of December, 1920. During all of the month of December, 1920, plaintiff shipped the defendant both lump and run-of-mine coal in accordance with the terms of the contract. Plaintiff did not receive any calls for coal for the month of January, 1921, and on December 21, 1920, plaintiff company requested a schedule of January, 1921, deliveries. On the same date Major Reuben C. Taylor sent the plaintiff the following letter:

ST. LOUIS, MO., *December 21, 1920.*

From: Depot Quartermaster, St. Louis, Mo.
To: Midland Coal Company, Kansas City, Mo.
Subject: Contract No. 2519.

1. On account of the transfer of the 7th Division from Camp Funston, Kansas, which means the practicable abandonment of the camp, supplies intended for that station will not be required in the very near future, in view of which

steps are being taken by this office to cancel, wherever possible, all running contracts and purchase orders.

2. Reference same, quartermaster, Camp Funston, Kansas, has requested that upon completion of deliveries as called for on calls 6 and 7 for December period on your contract 2519, no further deliveries on contract be made.

3. It is requested that you make arrangements accordingly advising this office in the premises at the earliest possible date.

By direction:

(Signed) RUEBEN C. TAYLOR,
Major, Q. M. Corps, Assistant.

On January 6, 1921, the Quartermaster General at Washington sent a telegram to the Chicago depot quartermaster, as follows:

"Corps area quartermaster stated that coal still being received at Camp Funston and request that all contracts for fuel, forage, and straw at Camp Funston be canceled at once. Please take immediate action to stop further shipments."

Under date of January 4, 1921, Major Taylor wrote the plaintiff that his office had no authority to cancel the contract and that his letter of December 21 was merely for the purpose of obtaining the plaintiff's opinion in the matter with a view of transmittal to Washington for instructions.

No further calls were made for deliveries of coal under the contract. Plaintiff company protested the suspension of deliveries and on January 7, 1921, wrote the Quartermaster General as follows:

JANUARY 7, 1921.

QUARTERMASTER GENERAL,
War Department, Washington, D. C.

Subject: Contract 2519—Camp Funston, Kansas.

DEAR SIR: For your reference we attach you herewith copy of letter received from the depot quartermaster at St. Louis, under date of December 21, our reply of December 24, our letter of December 31, and the depot quartermaster's reply of January 4.

The depot quartermaster has advised us that your office has been furnished information in connection with this matter under date of December 28, 1920, and that that office is awaiting further instructions from your office.

In view of the facts as stated in our letters of December 24 and December 31, we feel in fairness to ourselves that some

immediate action should be taken so that the tonnage due on this contract can be shipped, either to Camp Funston or to some other point which you may designate.

It seems to us that it is unfair to have these shipments suspended at this time, when the tonnage was held for this particular contract during such time as it could easily have been placed elsewhere, and which can not be done at the present time. May we not ask that this matter have immediate consideration and we be advised what action will be taken.

Yours very truly,

SALES MANAGER.

On February 5, 1921, the Quartermaster General delivered the following memorandum to the Director of the Supply Division, General Staff:

OFFICE OF THE QUARTERMASTER GENERAL,
Washington, February 5, 1921.

File No.

Memorandum for: The Director, Supply Division, General Staff.

Subject: Coal.

1. Reference to the attached telegram from the Cherokee Fuel Company, you are advised that the depot quartermaster, Chicago, Ill., was asked whether this coal could be diverted to any other camp, post, or station within his area of distribution, to which he replied as follows:

"Chicago, Ill., Feb. 2, 1921, Quartermaster General, Washington, D. C., J40A. There is no place to which coal can be delivered. J556GS (Signed) Thompkins."

2. In view of the abandonment of Camp Funston, the depot quartermaster has been directed to cancel all coal contracts for this post, advising the contractors that if they desired to make claim for any damages incurred, the same should be presented in order that it may be referred to the Auditor of the War Department.

(Signed) H. L. ROGERS,
Quartermaster General.

Under date of February 8, 1921, Major Reuben C. Taylor, assistant depot quartermaster, wrote plaintiff as follows:

ST. LOUIS, MO., *February 8, 1921.*

From: Depot Quartermaster, St. Louis, Mo.
To: Midland Coal Company, Kansas City, Mo.
Subject: Contract 2519.

1. Your letter of January 13, 1921, protesting cancellation of contract 2519 was in accordance with your request

submitted to the Quartermaster General. Reference same Quartermaster General has replied as follows:

"You are advised that the contract with the Midland Coal Company will be cancelled and that this firm be advised that if they have any claim for damages the same should be presented in order that it may be referred to the Auditor of the War Department."

By direction:

(Signed) REUBEN C. TAYLOR,
Major, Q. M. Corps, Assistant.

Under date of April 25, 1921, Colonel T. B. Hacker wrote plaintiff's attorneys that no more calls would be made on the Midland Coal Company under their contract No. 2519, and that the War Department considered the matter closed.

Plaintiff company was at all times ready, willing, and able to complete deliveries under its contract.

VII. By virtue of written orders dated November 30, 1920, and December 7, 1920, the Secretary of War, through the Adjutant General of the War Department, directed that the 7th division of the United States Army be transferred from Camp Funston to other camps, posts, and stations of the War Department. Accordingly between November 30, 1920, and December 31, 1920, the troops of the 7th division, together with equipment, vacated Camp Funston, Kansas. The transfer of the 7th division from Camp Funston amounted practically to an abandonment of the camp.

VIII. Plaintiff company was not the producer of the coal specified in the contract, but was engaged in the business of selling coal, and was the sales agent of the Kansas City Midland Coal and Mining Company, whose mines were located at Youngstown, Adair County, Missouri, from which the coal was to be obtained. Plaintiff company operated under contract to the Kansas City Midland Coal and Mining Company on a commission basis.

IX. The total tonnage of run-of-mine coal delivered by plaintiff and accepted by defendant was 4,189 tons. The total tonnage of lump coal delivered by plaintiff and accepted by the defendant was 4,034 tons, or a total of 8,223 tons. There were 14,771 tons of run-of-mine coal undelivered and 5,446 tons of lump coal undelivered.

A wage increase of $0.316 per ton was allowed plaintiff company by the Government August 15, 1920, in accordance with paragraph 19 (a) of the contract, which provides:

"It is agreed that if at any time during the continuance of the contract the wages so paid for the particular district are increased or decreased, the prices agreed upon and provided for in the contract shall be increased or decreased accordingly."

The total tonnage of the coal delivered by plaintiff company to the defendant was accepted and paid for at the contract price, including the wage increase.

X. The period between January 1, 1921, the date deliveries under the contract were suspended by the defendant, and June 30, 1921, the expiration date of the contract. was a period of unusual depression in the coal market and there was very little demand for coal of the kind and quality covered by the contract.

The fair market value of the undelivered lump coal f. o. b. mines Youngstown, Missouri, in January, 1921, was $2.125 per ton. The fair market value of the undelivered run-of-mine coal f. o. b. mines Youngstown, Missouri, in January, 1921, was 67½¢ per ton. The fair market value of the 14,771 tons of run-of-mine coal undelivered on January 1, 1921, was $9,970.42. The fair market value of the 5,446 tons of lump coal undelivered on January 1, 1921, was $11,572.75.

The original price named in the contract on the run-of-mine coal was $2.65 and on the lump coal $3.90 per ton. The difference between the aforesaid fair market value and the said original contract prices of the undelivered coal on January 1, 1921, was $38,839.38.

The prices so named in the contract, increased by the wage increase of $0.316 per ton, amount to $2.966 and $4.216 on the run-of-mine and the lump coal, respectively. The difference between such increased contract prices and the aforesaid fair market value of the undelivered coal on January 1, 1921, was $45,227.55.

Subsequent to January 1, 1921, coal continued to decline and in June, 1921, the fair market value of run-of-mine coal

Opinion of the Court

of the quality covered by the contract was about 50¢ per ton and the fair market value of lump coal of the quality covered by the contract was $1.75 per ton.

XI. On August 12, 1921, the plaintiff company, through its attorneys, filed a claim with the Quartermaster General for alleged losses sustained by reason of the " failure of the Government to take all of the coal contracted for." In said claim the alleged loss sustained upon the undelivered coal was said to be as follows:

14,771 tons of run-of-mine, @ $1.266 per ton	$18,109.25
5,446 tons of lump coal, @ $0.421 per ton	2,292.76
	20,402.01

Attached to said claim was a schedule showing the total sales, tonnage, and average selling prices from January 1 to June 30, 1921, f. o. b. mines, of the plaintiff company, as follows:

Kind of coal	Tons	Sales	Sales price per ton
(a) Lump and egg	46,901	$177,922.85	$3.795
(b) Stand mine run	33,564	115,909.92	3.453
(c) Through 1½-inch screens	15,265	26,562.54	1.74
(d) Waste	2,001		
	[1] 97,731	320,395.31	3.278

[1] Total production.

Said claim was disallowed by the General Accounting Office under date of October 23, 1922. Under date of May 11, 1923, the Comptroller General of the United States affirmed the disallowance of the General Accounting Office.

The court decided that plaintiffs were entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This case involves a contract dated July 1, 1920, for supplying coal to the Government at Camp Funston, Kans. The contract provides:

" The contractor shall furnish and deliver to the United States, and the United States shall accept and pay for the articles of work described and upon the terms and conditions set forth in Schedule 'A,' attached hereto and by reference made part hereof."

Schedule "A," among other things, provides:

"Schedule of Del.: As called for by the supply officers on or before June 30, 1921, of Camp Funston, Kans."

and contains the further provision:

"At the expiration of contract undelivered material not covered by calls will be automatically cancelled."

These two provisions of this schedule are not contained in the schedule in the *Burton case*, *infra*. The form of the body of the contract is the same as in the *Burton Coal Co. case*, 60 C. Cls. 294, 273 U. S. 337, and contains the following clause, which was in the contracts in both of these cases:

"Section 2. *Termination in public interest.*—If, in the opinion of the Quartermaster General, the public interest shall so require, this contract may be terminated by the United States by 15 days' notice in writing from the contracting officer to the contractor, and such termination shall be deemed to be effective upon the expiration of 15 days after the giving of such notice."

After the execution of the contract the defendant issued orders on the 29th of August and 30th of August, 1920, respectively, for the entire amount of both kinds of coal called for by the contract. It thus waived any privileges or rights which it might have had under the two provisions above quoted and became bound to take the whole amount of coal called for by the contract just as if there had been an original purchase of all of it by the terms of the contract and no provision as to deliveries and call, as was the case in the *Burton Coal Co. case*. The provision for the automatic cancellation at the expiration of the contract of coal not covered by calls became inoperative because all of the coal had been called for, and so, too, as to the provision regarding deliveries. Whether if all of the coal had not been called for the defendant would have been liable under its contract in case of a refusal to call for more and to take all of the coal is therefore not in the case. The question has been raised, but in view of the conclusion stated it is not necessary to pass upon it.

It does not appear that the Quartermaster General exercised the discretion necessary for cancellation or that the

contracting officer gave the required 15 days' notice. The case is therefore ruled by the *Burton Coal Co. case*. The defendant breached its contract by ordering the plaintiff to cease delivery of coal and its refusal to accept the balance of the coal which it was obligated to take. The plaintiff is therefore entitled to a recovery of such damage as it may have suffered by reason of the breach.

The contract in this case provides:

"Paragraph 19a.—Prices submitted shall be on the recognized scale of wages for the district in which the mine or mines from which the coal is to be furnished may be located. It is agreed that if at any time during the continuance of the contract the wages so paid for the particular district are increased or decreased the prices agreed upon and provided for in the contract shall be increased or decreased accordingly."

This provision was also in the contract in the *Burton Coal Co. case*. The plaintiff in this case, as in that, was a seller of coal and not a miner or producer. The contract here, as there, was a contract of sale. In the *Burton Coal Co. case* the increase of wages was allowed. The only difference between the two cases is that the allowance in the *Burton Coal Co. case* was made before the execution of the contract, but after its date, and in this case the allowance was made after the execution of the contract. It is not clear how this difference could affect the principle involved. As stated, this was a contract of sale, and by agreement of the parties the price named in the contract was increased on account of wage increase and an additional amount allowed, which had been paid for coal delivered up to the time of the breach of the contract. That a decrease in wages might have taken place after the date of breach, or what happened after that time, can not be considered in arriving at the rights of the parties at the time of the breach. At that time the contract price which the defendant was obligated to pay to the plaintiff was the contract price of the coal plus the allowance made for wage increase, and this must be the contract price to be used in estimating the plaintiff's loss or damage; that is to say, plaintiff's loss or damage is the difference between this price and the fair market value of coal at the date of

the breach at the place of delivery, which the findings show to have been the sum of $45,227.55. For this sum plaintiff should have judgment, and it is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice,* concur.

JOHN T. HICKEY v. THE UNITED STATES

[No. H-8. Decided May 28 1928]

On the Proofs

Contract of sale; liquidated damages; penalty.—(1) While the courts at one time were inclined to the view that liquidated damages provided for by contract were in the nature of a penalty, which they would not enforce, they now regard damages as a proper subject for agreement.

(2) Where a contract of sale provides that if the balance of the purchase money is not paid within the time specified, "the Government reserves the right to forfeit the deposit as liquidated damages, and the bidder shall lose all right or interest in the property," failure to comply with the condition gives the Government the right to rescind the contract and appropriate the deposit.

The Reporter's statement of the case:

Mr. Don F. Reed for the plaintiff. *Hatch & Reed* were on the brief.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, John T. Hickey, is a resident of Atlantic City, New Jersey; he has at all times borne true allegiance to the Government of the United States and has never given aid or encouragement to the enemies of the United States in rebellion; he is the sole owner of the claim presented in the petition, no part thereof or interest therein having been transferred or assigned to any person, firm, or corporation.

II. On February 9, 1922, the Quartermaster's Department of the United States Army held a public auction sale of surplus property, pursuant to previous notice in the form

of a catalogue, at the quartermaster intermediate depot in the city of Philadelphia, Pa. The surplus property to be sold was classified and listed in the said catalogue by the officers in charge of the depot.

Under lots Nos. 8 and 142 of the catalogue of auction sale of quartermaster surplus property held at the quartermaster intermediate depot, Philadelphia, Pa., on February 9, 1922, the following goods were offered for sale, stored at the Philadelphia quartermaster intermediate depot:

Lot No.	S. P. D.		Unit	
8	E-4298	Blankets, class No. 1, new	Each	6,639
142	E-6293	Duck, gray, S. F., blue line, 29-30 in., 30 x 40, 10-10½ oz.	Yard	8,166¾

III. Among other terms and conditions of this sale particularly pertinent to this claim are the following, appearing on pages 4, 5, 6, and 7 of the auction-sale catalogue:

Page 4: "Twenty per cent of the bid must be paid in cash or certified check at the time and place of sale; balance within ten days from date of sale in cash, certified check, or letter of credit, otherwise the Government reserves the right to forfeit the deposit as liquidated damages, and the bidder shall lose all right or interest in the property. * * * The letter of credit must be in the form approved * * *."

Page 4: "All property listed for sale * * * will be open for inspection for a period of one week prior to the sale * * *."

Page 4: "All property listed in this catalogue * * * will be sold 'as is' and 'where is,' without warranty or guaranty as to quality, character, condition, size, weight, or kind * * * and no claims for any allowances upon any of the grounds aforesaid will be considered after the property is knocked down to a bidder by the auctioneer."

Page 5: "Provided goods are paid for in full * * * the Government will permit the goods to remain in Government storage for thirty days from date of sale free of charge. * * * After this thirty days the Government will charge storage at local commercial rates * * *."

Page 5: "No claims will be entertained except shortage in delivery to the authorized representative of the purchaser."

Page 6: "Strict adherence will be required in the matter of payments * * *. No exceptions will be made * * *."

Page 7: "NOTE.—All articles listed in this catalogue will be sold 'as is' and 'where is' * * * Samples * * * on display are believed to be representative, and descriptions accurate. * * * No claims will be entertained should the articles vary from the samples or not come up to the expectations of the purchaser as to conditions, quality, color, size, weight," etc.

IV. For approximately one week prior to February 9, 1922, the date of said sale, there were open for inspection by prospective bidders, in the defendant's auction salesroom, six bales of blankets, wool, class 1, and in the defendant's warehouse there were open for such inspection approximately fifty bales of blankets (a total of approximately 332 bales), and the plaintiff visited the said salesroom for the purpose of inspecting, and did inspect, said six bales of blankets prior to the day of sale.

V. All of the goods listed under the lots 8 and 142 of the catalogue were awarded to the plaintiff, the 6,639 blankets at $1.90 each, amounting to $12,614.10, and the 8,166¾ yards of duck, at 14⅞ cents per yard, amounting to $1,214.80, the total amount of sale being $13,828.90. The plaintiff then and there made a deposit of $2,500 to apply on the purchase price of said blankets and duck, being approximately 20 per cent thereof, in accordance with the terms and conditions of the sale. And on the same day, to wit, February 9, 1922, the plaintiff sold the said blankets to N. Snellenberg & Company, of Philadelphia, Pa., who upon inspection on February 10, 1922, rejected said blankets for the reason that some of the bales contained cotton-warp blankets, and plaintiff was notified of such rejection and the reason therefor.

VI. By letter dated February 13, 1922, the defendant from the Philadelphia depot requested plaintiff to pay the balance due on said purchase on or before February 20, 1922, in accordance with the terms of sale, and also to furnish shipping instruction therefor. A letter of credit in the

amount due on this sale, $11,328.90, was sent to the defendant at the Philadelphia depot by W. H. Duval & Company, of New York City, agents for plaintiff, with its letter of February 20, 1922. The said letter of credit was returned to the said W. H. Duval & Company by the defendant on February 21, 1922, with the explanation that it did not conform to the required form. On March 2, 1922, the defendant, from the Philadelphia depot, made request on W. H. Duval & Company for letter of credit in the proper form. In answer to said letter the defendant received a letter from said W. H. Duval & Company, under date of March 4, 1922, stating that said letter of credit had been canceled and that all further communications relative to said purchase made by the plaintiff must be addressed to the plaintiff.

On March 4, 1922, the defendant, from the Philadelphia depot, wrote to the plaintiff requesting immediate settlement on the balance due on said purchase and further requesting that the plaintiff furnish shipping instructions to cover the shipment of the property so purchased, to which letter the defendant received no reply from the plaintiff.

VII. The Eastern Surplus Property Sales Board, at its meeting held on March 18, 1922, directed that the said sale to plaintiff be rescinded and the $2,500 deposit be forfeited to the Government as liquidated damages, the plaintiff not having paid for said property in accordance with the terms and requirements set out in the catalogue advertising said sale, and that the property in question be offered for sale at the next auction sale, with no further liability or obligation to be incurred by the plaintiff on account of the sale. On March 29, 1922, the plaintiff was by the defendant, from the Philadelphia depot, advised that rescission of the sale had been made and the $2,500 deposit forfeited as liquidated damages, to which notice the plaintiff made no reply.

VIII. On June 19, 1922, the entire quantity of duck, originally awarded at the auction sale to the plaintiff under lot No. 142, was transferred by the defendant without funds to the Department of Agriculture, and said blankets were not sold at public auction but at private sale, as set forth in Finding XII.

IX. On September 21, 1922, the defendant at the Philadelphia depot received a letter from Backrack Brothers, Inc., New York City, inclosing a letter from the plaintiff dated September 20, 1922, directing that shipment of said blankets and duck be made to Backrack Brothers and inclosing their certified check for $11,328.90, drawn by Backrack Brothers, Inc., in payment for the two lots of goods. The defendant from the Philadelphia depot replied to both of said letters under date of October 2, 1922, returning said check to Backrack Brothers, with the statement that it could not be accepted, and advising the plaintiff to that effect.

X. On October 6, 1922, approximately eight months after the sale, a meeting of the Eastern Surplus Property Sales Board was held, which was attended by the plaintiff in accordance with his request made on October 3, 1922. At said meeting the plaintiff stated that he was somewhat at fault in completing the purchase of said goods; that the letter of credit was returned to W. H. Duval & Company when he was out of town; that his mail was not forwarded to him, and that he neglected to give the matter of said sale his attention, and in the meantime a Mr. Workman, of W. H. Duval & Company, went to Philadelphia to examine the blankets, and upon finding that some of them were cotton warp and not blankets, class No. 1, new as listed in said catalogue, the matter was dropped, as it was not to their interest to remove the blankets. The plaintiff also stated at said hearing that part of the fault was due to the action of the defendant in not properly listing the goods; that he inspected the blankets, which were normal wool blankets made up of wool warp and wool filling, and that the matter finally came to his attention when he was called upon to deliver 2,000 blankets against a sale which was effected as a resale on such purchase, when he decided to accept the goods in order to save his deposit.

XI. No part of the said $2,500 aforesaid has ever been returned to plaintiff.

XII. The blankets in question were resold by the defendant as blankets, wool, class 1, to five hospitals during Sep-

tember, October, and November, 1922, at a fixed price of $11,684.64, or $1.76 per blanket, being 14 cents less per blanket than the plaintiff's bid made on February 9, 1922, making a net cash loss to the defendant (as compared to the original sale) of $929.46, exclusive of cost of resale, storage charges, and interest.

XIII. The plaintiff, John T. Hickey, purchased certain property from the defendant under sales No. E–12485, April 13, 1923, and as such purchaser was entitled to have said property stored in the defendant's warehouse at the quartermaster depot, War Department, Schenectady, New York, without cost to him, until May 9, 1923, and plaintiff was to pay for storing said property at local commercial rates if he permitted the same to remain in said warehouse after May 9, 1923; said property was left by plaintiff in defendant's warehouse from May 10, 1923, to September 6, 1923, occupying 2,550 square feet of storage space of the value of $127.50 per month, or $510 for four months' storage.

The plaintiff has refused and still refuses to pay the defendant the above-mentioned $510 charges for storing said property or any part thereof.

The court decided that plaintiff was not entitled to recover. Counterclaim allowed.

GRAHAM, *Judge*, delivered the opinion of the court:

This suit grows out of a sale by the War Department of certain surplus materials, consisting of blankets and duck. The terms and conditions of the sale are set out in Finding III, which contains, among other things, the following:

"Twenty per cent of the bid must be paid in cash or certified check at the time and place of sale; balance within ten days from date of sale in cash, certified check, or letter of credit, otherwise the Government reserves the right to forfeit the deposit as liquidated damages, and the bidder shall lose all right or interest in the property. * * * The letter of credit must be in the form approved * * *."

The plaintiff bid at the sale, his bid was accepted, and he thereupon paid to the defendant $2,500, approximating the 20 per cent provided for in the terms of sale. The balance

was to be paid within ten days, and if paid by letter of credit it was to be " in the form approved."

On February 20, 1922, a letter of credit in the amount due on the sale, $11,328.90, was sent to the defendant at its Philadelphia depot by W. H. Duval & Company, of New York City, agents for plaintiff. The letter of credit was returned to W. H. Duval & Company on February 21, 1922, with an explanation that it did not meet the required form, and inclosing a blank approved form for a new letter of credit. Under the terms of the sale the defendant was within its rights in declining to receive the letter of credit in a form not approved.

Thereafter, not receiving a reply or payment, the defendant wrote again to the W. H. Duval & Co., requesting a letter of credit in proper form. On March 4, 1922, the company replied that the letter of credit had been canceled, and that all further communications relative to the purchase should be addressed to the plaintiff. Thereupon, on March 4, the defendant again wrote to plaintiff, requesting a settlement of the balance due, to which request it received no reply. After waiting two weeks the defendant, through the Eastern Surplus Property Sales Board, at its meeting held on March 18, 1922, rescinded the sale and the plaintiff's right and interest in the property, declared the $2,500 deposit forfeited to the Government as liquidated damages upon the ground that the plaintiff had not paid for the property in accordance with the terms of the contract of sale, and directed that the property be resold as the property of the Government. On the 29th of March, 1922, the plaintiff was notified of the rescission of the sale and the appropriation of the $2,500 deposited as liquidated damages, to which plaintiff made no reply. Nothing was done by plaintiff in the matter until September 21, 1922, as hereinafter stated.

The defendant on June 19, 1922, sold the blankets at a private sale, and transferred to the Department of Agriculture the duck which was the subject of the previous sale.

Three months later, on September 21, 1922, plaintiff tendered to defendant a certified check of Backrack Brothers, Inc., to whom it had apparently sold the blankets and duck.

This offer was refused by defendant, as it had already disposed of the property. Thereafter plaintiff appeared at a meeting of the Eastern Surplus Property Sales Board and stated in effect that the goods were not of the quality that had been sold to him, and that for this reason the matter had been dropped, as it was not to his interest to remove the blankets. This complaint, it will be seen, was not made until nearly four months after the goods had ben resold and after notice that the sale had been rescinded, to which notice no reply was ever made, and it must be assumed that plaintiff acquiesced in the action of the Government.

As to the complaint about the quality of the material, there is nothing in the case but this statement of the plaintiff. Even accepting it as a fact, it would not relieve the plaintiff from his obligation under the terms and conditions of the sale. The terms of sale were that the material was sold "as is and where is, without warranty or guaranty as to quality, character, condition, size, weight or kind, * * * and no claims for any allowances upon any of the grounds aforesaid will be considered after the property was knocked down." This form of contract has been heretofore passed upon by this court. See the *Triad case*, 63 C. Cls. 151.

The original tender by plaintiff of a certified check was rejected because it was not in proper form, and this was the right of the defendant, as the contract provided that the letter of credit "must be in the form approved." But a tender to be good must be maintained, and in this case the tender was withdrawn, and the defendant notified that the letter of credit had been canceled. The time fixed for the payment of the balance of the purchase money was ten days from February 9, 1922. Failing to hear from plaintiff, after requesting payment of the balance, after the tender had been withdrawn, the defendant exercised its right to rescind the contract and terminate the right and interest of the plaintiff in the property, and appropriate the 20 per cent deposit.

It is contended that the defendant had no right to appropriate, or, as the plaintiff puts it, to forfeit the $2,500 as liquidated damages; that it was enforcing it as a penalty,

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which the courts are not inclined to favor. The parties have a right to contract upon the basis of the sum deposited being liquidated damages, and if it appears to have been the intention of the parties that it should be so treated, that intention will be carried out.

The courts at one time were disinclined to enforce contracts providing for liquidated damages, and leaned to the construction of such provisions as penalties. Subsequently this view was greatly modified, until now the courts have become strongly inclined to allow the parties to make their own contracts, and to carry out their intentions. The question now is always, What was the intention of the parties. See opinion of Justice, afterwards Chief Justice, White in *Sun Printing & Publishing Co.* v. *Moore*, 183 U. S. 642, where the authorities on this point are fully reviewed; also *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119; and *Tayloe* v. *Sandiford*, 7 Wheat. 13, 5 L. Ed. 384. See *Lamport Manufacturing Co.*, C–1209, this day decided (*ante*, p. 579).

It would be difficult in a contract to declare the intention of the parties more clearly than in this contract. It provides that if the balance of the purchase money is not paid within the time specified, the Government shall have "the right to forfeit the deposit as liquidated damages," and showing that this meant the rescission and termination of the contract and plaintiff's interest therein, it provides that the "bidder shall lose all right or interest in the property."

We hold that under this contract the deposit of $2,500 was made with the intention that it was to be treated as liquidated damages upon the failure of the plaintiff to comply with the terms of the contract.

It is to be observed in conclusion that the defendant dealt fairly with plaintiff in this whole matter. It did not insist upon the forfeiture of the deposit upon the failure of plaintiff to pay the balance in ten days as it had a right to do, but made three attempts to have the plaintiff comply with its contract, and only asserted its right to rescind the contract and appropriate the deposit after more than a month had

passed, two weeks after its third request for settlement. It notified the plaintiff of the rescission promptly and received no reply, and two months later resold the goods as its own. See *Lamport Manufacturing Supply Co.* v. *United States*, C–1209, this day decided.

The defendant has interposed a counterclaim for $510, which under the facts should be allowed. Let the petition be dismissed and judgment be entered in favor of defendant in the sum of $510, with interest from September 10, 1923, to date of judgment.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

GEORGE BURKHART, RECEIVER OF THE COMPAC TENT CO. v. THE UNITED STATES

[No. D–18. Decided May 28, 1928]

On the Proofs

Contract for manufacture of tents; materials furnished by Government; retention of manufactured articles at Government's request; destruction by fire.—A contract whereby the Government was to furnish the materials therefor and the contractor was to manufacture tents included the following provision: "Note: The contractor will be held liable for any loss of, or damage to, any of the materials furnished by the Quartermaster Corps, from any cause whatsoever, while in his possession." A number of the tents when completed and ready for delivery were retained by the contractor at the Government's request and for its convenience, and after such request were, together with the materials not worked up, destroyed by fire through no fault of the contractor. *Held*, that the provision for liability was a valid contractual stipulation, not a mere legal conclusion; but that the contractor was liable only for the value of the unworked material furnished by the Government and entitled to the contract price of the manufactured articles retained at the Government's request.

The Reporter's statement of the case:

Mr. Camden R. McAtee for the plaintiff. *Mason, Spalding & McAtee* were on the briefs.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, George Burkhart, is the duly appointed and qualified receiver of the Compac Tent Company, a corporation organized under the laws of the State of Indiana, with its principal office at Indianapolis in that State, engaged in the business of manufacturing tents, tent flies, wagon covers, and similar articles from duck and canvas.

II. During the year 1917 the War Department, through the Quartermaster Corps, contracted with plaintiff corporation for the manufacture of certain tent flies, from materials to be furnished by the Government, said contracts known as purchase orders being more particularly described as follows:

1. On or about June 20, 1917, Purchase Order 1885, for manufacture of 8,648 large wall tent flies at $3.74 each, a total of $32,343.52, and of 30 small wall tent flies at $2.07 each, a total of $62.10, the Government to furnish all duck and metallic tent slips and contractor to provide all other material and labor, delivery to be completed on or before November 7, 1917.

2. On or about June 25, 1917, Purchase Order 1953, for manufacture of 600 large wall tent flies at $4.90 each, a total of $2,940.00, delivery to be completed within 42 days after receipt of material.

3. On or about August 13, 1917, Purchase Order 2855, for manufacture of 120 small wall tent flies at $2.07 each, a total of $248.40, to be delivered within 21 days after receipt of material.

4. On September 18, 1917, Purchase Order 3564, for manufacture of 200 small wall tent flies at $2.07 each, a total of $414.00, to be completed within 4 days after receipt of material.

Purchase Order No. 1885, dated June 20, 1917, annexed to the petition as Exhibit A, is as follows:

"Emergency Purchase. Purchase Order No. 1885.
"Required for immediate use. (When writing quote above number.) 271-15.

"*Contract*

"WAR DEPARTMENT,
"OFFICE OF THE DEPOT QUARTERMASTER,
"*Jeffersonville, Indiana, June 20, 1917.*

"File No. 424.2.
"Address all communications to depot quartermaster.
"All shipments to be followed by tracer to insure prompt delivery.
"Important: Each shipment must be accompanied by an itemized invoice bearing this order No.; otherwise it may be necessary to refuse to accept the shipment.

"COMPAC TENT COMPANY, INC.,
"*10th St. & Canal, Indianapolis, Ind.*

"Your quotation is hereby accepted for furnishing and delivering the following supplies, subject to the usual inspection.

"Three copies of your bill, *with number of this order thereon*, must be sent to this office as soon as the supplies are shipped. Invoice to be accompanied by bill of lading.

"Place of delivery: f. o. b. Jeffersonville, Indiana. Delivery to commence on or before June 30th, 1917, at the rate of 500 tent flies per week. Delivery to be completed on or before November 7, 1917.

"REPLENISHMENT OF STOCK,
"S. S. & T.

"Req. S-151 F. Y. 1917.

"8,678 Flies, tent, as per C. & E. specifications 1236 and standard sample. Government to furnish all duck and No. 3 metallic tent slips delivered f. o. b. factory; contractor to deliver finished flies f. o. b. Jeffersonville, Ind.

"8648—Wall, large, each \$3.74—For all________ \$32, 343. 52
"30—Wall, small, each \$2.07—For all_________ 62. 10

"NOTE.—The contractor will be held liable for any loss or any damage to any of the materials furnished by the Quartermaster Corps, from any cause whatever, while in their possession.

"By Direction of D. Q. M.
"(Signed) ALBERT F. VOLGENAU,
"*Captain, Q. M. U. S. R., Asst. to D. Q. M.*
"MCV-AGW
"(MCA-FEW)

"No excess should be delivered. It is preferred that deliveries be slightly less than amounts specified if it is impracticable to furnish the exact quantity called for."

Purchase Orders Nos. 1953, 2855, and 3564, annexed to the petition as Exhibits C, D, and E, and made a part hereof by reference, were with the exception of dates and figures, similar in all respects to Purchase Order No. 1885 set forth above.

A formal contract, covering the exact material called for in Purchase Order 1885, was entered into between the parties, said contract being attached to the petition as Exhibit B, and is made a part hereof by reference.

III. Each of said purchase orders, and the formal contract referred to, contained the following provision:

"The contractor will be held liable for any loss or any damage to any of the materials furnished by the Quartermaster Corps, from any cause whatever, while in their possession."

IV. Plaintiff corporation completed and delivered to the Quartermaster Corps at Jeffersonville, Indiana, 101 large wall tent flies at $3.74 each, and 29 small wall tent flies at $2.07 each, a total of $437.77, for which the corporation has received payment from the United States.

On January 13, 1918, plaintiff corporation had in its possession material furnished by the Government for the manufacture of the tent flies, viz, 79,008 yards of 28½″ khaki duck and 10,586 No. 3 tent slips, of the aggregate value of $34,265.04. This included the material used in the manufacture of 1,000 large wall tent flies completed by the plaintiff.

V. On the night of January 13, 1918, a fire of unknown origin occurred in plaintiff corporation's plant, totally destroying the plant and its contents. The fire, which was without any fault on the part of the plaintiff corporation, started in another wing of the building not controlled by it.

VI. On January 14, 1918, plaintiff corporation notified the depot quartermaster at Jeffersonville, Ind., as follows:

"Regret to inform you that we had a fire last night, suffering total loss of all merchandise on hand and would thank you to forward us inventory of merchandise shipped us.

"We have temporary quarters and equipment and can go ahead with the contract and complete it. Please arrange to ship us additional duck and slips."

VII. On January 19, 1918, the depot quartermaster wired plaintiff corporation as follows:

"Have been advised by purchasing and manufacturing office that supply large wall tent flies on hand is adequate for all requirements, therefore can not replace duck destroyed by fire and must cancel contract. Advise receipt."

Thereafter no material was furnished plaintiff corporation for the completion of the contracts, which were considered as canceled.

VIII. After suspending said purchase orders the depot quartermaster required plaintiff corporation to account and pay for the Government materials destroyed in the fire, and plaintiff corporation, in paying same in the sum of $34,265.04 on February 28, 1918, accompanied payment with the following letter:

"COMPAC TENT COMPANY,
"*Indianapolis, Ind., Feb. 28, 1918.*

"DEPOT QUARTERMASTER, U. S. A.,
"*Jeffersonville, Ind.*

"(In re file No. 422.2)

"Dear Sir: Referring to our contract with the U. S. Government through the Jeffersonville Depot for the making of tentage covered by purchase order Nos. 1885, 1953, 2855, and 3664, in which, as you are aware, we had a loss by fire on January 13, 1918, of 83,948 yards of 28½" 10 oz. khaki Army duck and 12,000 brass tent slips and settlement for which has been held in abeyance pending the adjustment of our insurance, we are now pleased to advise you that the insurance has just been collected, and we are herewith inclosing certified check for $34,265.04 in settlement for the duck and tent slips at the contract price as follows:

"For materials shipped us to be manufactured into tentage for the depot:		
8,948 yards 28½" 10 oz. khaki duck at 43c		$36, 097. 64
12,000 No. 3 tent slips @ $2.7912 per 100		334. 94
		36, 432. 58
"Minus:		
4,940 yds. 28½" 10 oz. khaki duck @ 43c	$2, 128. 07	
1,414 #3 tent slips @ $2.7912 per 100	39. 47	
		2, 167. 54
		34, 265. 04

"used in the manufacture of 101 tent flies shipped the depot on 1/10/18,

Reporter's Statement of the Case

"belonging to the Government and which was destroyed by fire, this being the net total of material charged to us by the Government.

"In this connection, however, we wish most respectfully to call your attention to the fact that we have been grievously hurt by the attempted cancellation on the part of the Government of the unfulfilled portion of our contract, and the loss suffered thereby is most serious to us.

"We have no disposition at this time to assert any claim for this loss, and yet do not feel called upon to waive the same or to recognize in any way the right of the Government to cancel the contract.

"We feel quite confident, in view of the assurances given us by various representatives of the Government with regard to future business, that our loss on account of this contract will be more than made good to us through the opportunities for profits on future business.

"We beg to remain, yours very truly.

"COMPAC TENT COMPANY (INC.),
"M. T. SCOTT, *Treas.*"

IX. On or about January 10, 1918, an officer, whose name and rank were unknown to plaintiff corporation's president, called on the latter at the plant and requested plaintiff corporation to hold the shipment of 1,000 tent flies, then completed and ready for delivery, and to make arrangements to have them stored in a warehouse. He stated that plaintiff corporation would be notified from Jeffersonville later.

On January 16, 1918, three days after the destruction of the plant by fire, plaintiff corporation received the following wire from the depot quartermaster at Jeffersonville:

"Wire immediately if you can hold supplies you are furnishing this depot under present contracts for next ninety days, and whether or not you can find available warehouse space for such part of these supplies as you are not now able to warehouse for us; also, total cost to Government of such arrangements in addition to terms your present contract itemizing latter cost in detail."

The contract price of the 1,000 tent flies above mentioned was $3,740.00.

These 1,000 tent flies contained material furnished by the Government to the amount of $21,365.47.

X. The claim herein was presented to the advisory board, Clothing and Equipment Division, sitting at Jeffersonville,

Ind., which board on February 19, 1919, recommended settlement by a supplemental contract with plaintiff corporation upon the basis of certain items thereof in the amount of $9,557.49. Thereafter plaintiff corporation presented said claims for review and further consideration to the Board of Contract Adjustment of the War Department, under the provisions of the act of March 2, 1919, known as the Dent Act, and said board on December 4, 1920, recommended settlement of plaintiff corporation's claim in part by the Secretary of War through the purchase section, War Department Claims Board. Before said purchase section, War Department Claims Board, plaintiff corporation presented figures and evidence to establish the amount of its claim, and a question arose as to whether the same were included within the settlement recommendations of the Board of Contract Adjustment, which question was taken to the Secretary of War for decision on appeal, and the Secretary, on or about September 14, 1921, rejected said claims and denied to plaintiff corporation any relief in the premises.

The court decided that plaintiff was entitled to recover, in part.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This is a Dent Act case. The plaintiff is the receiver of the Compac Tent Company, an Indiana corporation. During the war the corporation entered into four contracts to manufacture from material furnished by the Government a specified number of wall-tent flies. Taking the record as it is, the transactions involved were consummated in the following manner: Proposals were solicited by the Government for supplying the needed tent flies, the corporation to do the work, furnish some minor essentials, and the Government to furnish all the material. The corporation submitted its proposals, the acceptance of which is evidenced by one proxy-signed formal contract and four written purchase orders. The Government furnished and the corporation had in its possession a large quantity of material with which to perform its contracts. Some of this material had been converted into wall-tent flies and the quantity with

which this suit is concerned had not been so converted. On the night of January 13, 1918, the corporation's plant, through no fault of the corporation, was totally destroyed by fire. The corporation's loss was a total one, both plant and contents being consumed. Immediately after the fire the corporation obtained quarters and was proceeding to set up machinery and an organization to continue its performance of the contract, when, on January 19, 1918, the Government canceled the contract, assigning as a reason therefor its inability to replace the material destroyed and the further fact that the need for the tent flies had passed, the Government having on hand a sufficient supply. A short time subsequent to the fire the Government required the corporation to account for the material destroyed and pay therefor the sum of $34,265.04, the admitted value of the same. The corporation paid this sum on February 28, 1918, transmitting the same in a letter, as appears from Finding VIII. This sum constitutes one of the items for which this suit is brought.

The corporation had completed and was ready to deliver 1,000 tent flies, for which it was to receive $3,740.00 prior to January 10, 1918. The record sustains the fact that on or about January 10, 1918, the corporation was requested by an agent of the defendant to withhold shipment of the completed tent flies, and make arrangements to store them for the Government. On January 16, 1918, the official character of the agent's visit, as well as the purpose of it, was confirmed by a telegram from the depot quartermaster at Jeffersonville, Indiana, inquiring as to the corporation's available storage space to store the flies and the cost thereof. All of the completed flies were destroyed in the fire, involving a loss of $3,740.00, the cost of making the same, and $21,365.47 worth of material. The corporation also includes this item in this suit. Several additional items are included for which recovery is asked in the petition. One in particular is a claim for overhead and monetary outlay predicated upon an alleged breach of the contracts, the corporation contending that the termination of the contract constituted a breach of the agreement, rather than a

cancellation, there being no provision in the contracts for cancellation. We do not think the contention is sustained. While there exists some evidence of a feeble attempt to reserve rights in the letter of February 28, 1918, nevertheless it is manifest that at the time the letter was written the corporation was in a state of indecision, and subsequent events seem to clearly disclose an acquiescence in what was done. In any event, the most that can be said as to protest is a counter proposition by the corporation that if future orders made up the loss no claim would be preferred for the same. While we think a claim did exist for expenditures incurred directly after the fire and up to date of cancellation, a claim which fails for lack of proof, we are convinced that the other claims in this respect are without merit.

The right to recover the item of $34,265.04 is rested upon a contention of the corporation's common-law liability as a bailee of the materials destroyed. The argument advanced is predicated upon proof of absence of negligence upon the corporation's part and the loss of the materials through inevitable accident. The defendant contests the allowance, claiming an express contract, by the terms of which there was imposed upon the corporation an obligation of liability for the materials committed to its custody, irrespective of the cause of loss. Paragraph one of the written contract is closed with the following provision: "Note: The contractor will be held liable for any loss of, or damage to, any of the materials furnished by the Quartermaster Corps, from any cause whatsoever, while in his possession." This identical provision appears in each of the purchase orders preceding the signature of the contracting officer. The contractor insists that the phraseology of the note and its position in the written instruments amounts to no more nor less than a mere addendum reciting an intention to do the thing specified and the Government's legal conclusion as to the corporation's liability; that it is devoid of expressive words sufficient to create a contractual stipulation imposing upon the contractor the liability of an insurer. Finally, it is insisted that the provision is absolutely void as a modification of the original contract for lack of mutuality. Several

cases are cited to sustain the argument. So far as the present record is concerned, the court is informed that the corporation's "quotation is hereby accepted." This appears in the purchase orders. From these words we infer that quotations were solicited. The contract was consummated by the transmission to the corporation of the purchase orders, i. e., it required the submission of the quotations and the acceptance by the way of express purchase orders to complete the contract.

Whether the corporation was advised previous to the transmission of the purchase orders that its common-law liability as a bailee was to be changed by express provisions to the contrary is not disclosed. There can be no doubt, however, that when the corporation received the purchase orders it was made fully aware of an emphasized purpose and intent on the part of the Government to hold it liable as an insurer for the materials entrusted to its possession. Obviously, there then existed an opportunity for the corporation to disavow such a liability and refuse to go forward with the contract. Up to this point the corporation had incurred no liability of any character whatever. It had simply transmitted its offer. There remained before the contract came into being its acceptance, and if the Government qualified its acceptance and proposed conditions tending to increase liabilities and enhance the risk of the contractor beyond those contemplated in its proposal, the corporation was clearly under the necessity of indicating its dissent to the same, whatever may have been its conception of its rights and obligations in the first instance. If under these conditions the corporation proceeded to perform the contracts, received and accepted the materials sent to it, we see no escape from the conclusion that it assented to the terms of the purchase orders and was obligated thereby. No claim, we think, could be advanced of lack of mutuality under the proxy-signed contract. This contract was duly executed with the provision in it and no protest or evidence of dissent is shown. Much reliance is placed upon the case of *Utley* v. *Donaldson*, 24 L. Ed. 54, to sustain the right of recovery. In this case the Supreme Court was dealing with

a modification of a contract involving a sale consummated by an offer and acceptance, later modified by the vendor upon the delivery of the articles sold. The manifest difference between the cited and the instant case impresses us as residing in the fact that in this case there was no modification of a completed contract. On the contrary, before the proposals had been accepted the Government in express terms states the conditions upon which they are accepted, and without protest the contractor proceeded with the performance of the contract.

The source from which mutuality is to be ascertained is the conduct of the parties in conjunction with whatever written documents obtain and from all the surrounding circumstances of the transaction. Here we have contracts by the terms of which the Government parts with possession of material of great value, many times as valuable in dollars and cents as the consideration to be paid the contractors for doing the contract work. We must assume, in view of this situation, that the Government intended to protect its interests and that the clause in question was designed for that purpose. There is nothing unfair in doing so. No "snare" was laid to entrap the contractor. The provision was conspicuous and emphatic in both the formal contract and the purchase orders. The plaintiff corporation does not seek to plead ignorance of it and we think it was binding. We think the claim for $3,740.00, contract price of the tents, and $21,365.47, value of material going into the same, is recoverable. The corporation had earned the compensation. The merchandise was ready to be delivered, and would have been delivered except for the instructions to withhold delivery and store the same. The 1,000 tent flies were wrapped in burlap ready for immediate delivery, and it is not contradicted that the officer directing their storage did not even inspect the same, but ordered a delay in delivery and storage of the same. The Board of Contract Adjustment recommended payment of this item in part. The Government challenges the sufficiency of the proof to sustain recovery. We think it preponderates in favor of recovery. The visit of the inspector, while his identity is not disclosed, is con-

firmed by the telegram of the Government officer dispatched on January 17, 1918. The Government was evidently in need of storage capacity, and did not want immediate delivery; supplies were coming in which taxed the storage capacity of the depot quartermaster, and it is inconceivable that the corporation would have retained the tent flies unless requested so to do. The record clearly discloses that it was to the advantage of the Government to have the tent flies stored in the plant of the corporation, and that inasmuch as delivery was in the course of being made and the acts of the defendant precluded its consummation by reason of a pending contract for storage, we think judgment for the sum of $25,105.47 should be awarded. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge,* concur.

JOHN G. ROUSE, EXECUTOR OF THE WILL OF WILLIAM C. ROUSE, v. THE UNITED STATES

[No. H-400. Decided May 28, 1928]

On the Proofs

Federal estate-transfer tax; credit for payment to State, Territory, or District of Columbia; constitutionality.—Section 301 (b) of the revenue act of 1924, which provides that the Federal estate-transfer tax "shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory, or the District of Columbia, in respect of any property included in the gross estate," such credit not to exceed "25 per centum of the tax imposed by this section," is uniform in its operation, is not a restriction on the exercise or nonexercise of the taxing powers of a State, and does not permit a credit of 25 per centum in the tax return of an estate paying no estate, inheritance, legacy, or succession taxes to a State, Territory, or the District of Columbia.

The Reporter's statement of the case:

Mr. Charles Markell for the plaintiff.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is the executor of the will of William C. Rouse, late of Baltimore, Maryland. William C. Rouse died on September 24, 1925, leaving a will, which was duly probated in the Orphans' Court of Baltimore, by which the plaintiff was appointed executor, and on which letters testamentary were duly granted by the said Orphans' Court to the plaintiff, who duly qualified and ever since has been and is acting as such executor.

II. The plaintiff as such executor duly made return for Federal estate tax in manner and form (Form 706) prescribed by law and by the Treasury Department and the Commissioner of Internal Revenue. In said return the "net estate for tax" shown in Schedule L was $550,533.59. On $550,533.59 the amount of tax mentioned in subdivision (a) of section 301 of the revenue act of 1924 (as amended by section 322 of the revenue act of 1926) is $19,532.02. After deducting therefrom twenty-five per centum thereof, viz, $4,883, a balance of $14,649.02 was shown in said return as "amount of estate tax payable after subtracting credits" and was paid by the plaintiff to the collector of internal revenue on September 23, 1926.

By letters dated February 12, 1927, and March 10, 1927, the Commissioner of Internal Revenue advised the plaintiff that from an audit and review of the plaintiff's estate-tax return the "net estate for tax" had been determined to be $553,701.69, $3,168.10 more than the amount shown in the return, and a deficiency in estate tax had been determined to be $190.08 over and above the aforesaid deduction of $4,883 made in the return but not allowed by the commissioner. Said amount, $190.08, is the amount of tax mentioned in subdivision (a) of section 301 of the revenue act of 1924 (as amended by section 322 of the revenue act of 1926) on $3,168.10 (over and above $550,533.59). Subsequently the plaintiff received notices of assessment and demands for payment of taxes accordingly, viz, $190.08 with interest at six per cent per annum from September 24, 1926, and $4,883 with interest at one per cent per month from the same date. On April 19, 1927, the plaintiff paid under protest the

amounts so assessed, viz, $4,883 plus $335.30 interest, a total of $5,218.30, and $190.08 plus $5.62 interest, a total of $195.70. The plaintiff claimed the right to a deduction of twenty-five per centum of the last-mentioned amount of $195.70, viz, a deduction of $48.92. The plaintiff also claimed the right to a deduction of the entire amount of $5,218.30, viz, $4,883 plus $335.30 interest.

III. No estate, inheritance, legacy, or succession taxes have actually been paid by the plaintiff to any State, Territory, or the District of Columbia. In the plaintiff's return for Federal estate tax, however, the plaintiff claimed the right to deduct from the amount of tax mentioned in subdivision (a) of section 301 of the revenue act of 1924 (as amended by section 322 of the revenue act of 1926) twenty-five per centum, because the tax alleged to be imposed by said section 301 as amended and said section 301 itself is, to the extent of any amount in excess of seventy-five per centum of the amount mentioned in said subdivision (a), null and void, for the reasons (1) that such alleged tax is contrary to the provision of Article I, section 8, of the Constitution of the United States, that "all duties, imposts, and excises shall be uniform throughout the United States," and (2) that such alleged tax is an attempt to tax and control the sovereign taxing powers of the several States and the exercise and nonexercise of such powers.

IV. On or about June 23, 1927, the plaintiff filed with the collector of internal revenue a claim for refund of $5,267.22, the amount of tax (including interest) exacted from and paid by the plaintiff as the result of disallowing the deduction of twenty-five per centum hereinbefore mentioned. Said claim for refund was by the Commissioner of Internal Revenue disallowed and rejected on July 25, 1927.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff as an executor made a return for Federal estate tax in the manner prescribed by the Commissioner of Internal Revenue. The details as to the assessments and payments are set forth in the findings.

Section 301[5] of the revenue act of 1924, 43 Stat. 303, is the section of the statutes involved and is quoted below.

The plaintiff claimed a deduction of 25% of the tax, although he had paid no estate, inheritance, legacy, or succession tax in any State, Territory, or the District of Columbia. The commissioner disallowed this deduction and assessed him for the full amount of the tax provided in the statute. The plaintiff rests his case here upon the ground that the said act is unconstitutional. He states his contention as follows:

"This so-called estate tax, to the extent of twenty-five per cent [the excess over seventy-five per cent] of the amount mentioned in subdivision 301 (a), is unconstitutional, because to this extent (1) it is a tax, not on the transfer of estates but on the taxing powers of the several States, and a tax or penalty on the exercise and nonexercise of such powers, and (2) it is contrary to the provision of Article I, section 8, of the Constitution that 'all duties, imposts, and excises shall be uniform throughout the United States.'"

The principles controlling here were settled in the cases of *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, and *Florida* v. *Mellon*, 273 U. S. 12. The latter case expressly held constitutional a corresponding section of the revenue act of 1926, except for the difference in the increase of the credit for estate taxes from twenty-five to eighty per cent, and which is identical with section 301 of the revenue act of 1924 under consideration here.

The act here is uniform in its operation, as the rule of liability is the same in all parts of the United States. If in the case of individual residents of different States it re-

[5] SEC. 301 (a) In lieu of the tax imposed by Title IV of the revenue act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States:

* * * * *

(b) The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory, or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 25 per centum of the tax imposed by this section.

(Subdivision (a) was amended by section 322 of the revenue act of 1926, reducing the graduated percentages of the net estate retroactively, as of June 2, 1924.)

Opinion of the Court

sults in inequalities it is not due to the act, but to the inequalities created by the action of the State authorities either in the kind of estate tax act established or the failure to establish one. It is in no sense a restriction on the exercise or non-exercise of the taxing powers of the State. Any State can pass any sort of an estate tax it pleases or refrain from doing so. There are no restrictions. The act does not apply to the States but to individuals. Had it allowed no deduction, there could have been no question in regard to its constitutionality. It was an act passed in the exercise of the constitutional power of Congress to levy and collect the tax, and it has been repeatedly held that such an act can not be nullified or set aside by any statute of a State, and that where the two come in conflict, the latter must give way.

The power to levy and collect taxes is a vital and necessary part of sovereignty. No Government can exist without its exercise. It is a power, where granted by the Constitution to the Federal Government, which can not be interfered with or nullified by any act of the States. But as stated, this act does not interfere in any way with State statutes. This court has on several occasions in somewhat similar cases upheld this principle. See *Steedman et al.* v. *United States*, 63 C. Cls. 226, 233, and *Aldridge* v. *United States*, decided January 16, 1928 (64 C. Cls. 424).

In the *Florida case*, *supra*, the court said:

"Congress can not accommodate its legislation to the conflicting or dissimilar laws of the several States nor control the diverse conditions to be found in the various States which necessarily work unlike results from the enforcement of the same tax."

The petition should be dismissed, and it is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

FACULTY CLUB OF THE UNIVERSITY OF CALIFORNIA v. THE UNITED STATES

[No. H-426. Decided May 28, 1928]

On the Proofs

Taxes; initiation fees; social, athletic, or sporting club.—Where the material purpose of a club is to promote mutual acquaintance and fellowship among the officers of instruction of a university and the club is not an essential adjunct of the university, it is a social club within the meaning of the revenue laws, whose initiation fees are taxable.

The Reporter's statement of the case:

Mr. John F. McCarron for the plaintiff. *Mr. George E. Hamilton* was on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Faculty Club of the University of California, plaintiff herein, was founded and its constitution was adopted in 1902 as the outgrowth of a dining association. Article I of the constitution of the Faculty Club of the University of California provides:

"The name of this organization shall be the Faculty Club of the University of California. Its object shall be to promote mutual acquaintance and fellowship among the officers of instruction and government of the university."

Article II of the constitution provides who shall be members of the club and divides them into five classes: Active, associate, nonresident, transient, and honorary. The following classes of men are made eligible for active membership:

Members of the board of regents of the university.

Officers of administration at Berkeley.

Officers of instruction or research in the colleges and schools at Berkeley.

Officers of administration and instruction in the university extension division at Berkeley.

Officers of the agricultural experiment station at Berkeley.

Officers of the agricultural extension service at Berkeley.

Officers of other branches of the university who are resident in Berkeley. Teaching fellows and other fellows and graduate scholars are made eligible for transient membership. The board of directors may invite to associate membership certain persons not exceeding in number 200 and "may also elect to associate membership persons who would be of assistance in club entertainments by virtue of their special talents," to be exempt from payment of dues and not to exceed 25 in number.

II. During the period from October, 1921, to and including September, 1925, plaintiff paid a total of $5,322.87 to the collector of internal revenue at San Francisco, California, as taxes on dues of its members.

III. Under date of April 24, 1926, plaintiff filed a claim for refund on the proper form of the Bureau of Internal Revenue (Form 843) with the collector of internal revenue at San Francisco, California, in which it requested refund of the said amount of $5,322.87 paid by it as taxes on dues of its members, and contended that its application for refund should be allowed on the ground that it was not a social, sporting, or athletic club within the meaning of section 801 of the 1918 and 1921 revenue acts and section 501 of the 1924 internal revenue act and article 5 of part 2 of Regulations 43 of the Bureau of Internal Revenue under the 1924 revenue act.

IV. The Commissioner of Internal Revenue, under date of March 26, 1927, rejected the said refund claim filed by plaintiff on April 24, 1926, for the recovery of $5,322.87 paid by it as taxes on dues of its members, and held "that the social features form a material purpose of the organization, and that it qualifies as a social club or organization within the meaning of section 801 of the revenue acts of 1918 and 1921, and section 501 of the revenue act of 1924," and the taxes paid as aforesaid are still retained by the defendant.

V. The club furnishes a medium for a wide range of academic activities. Important committees of the Academic Senate of the university meet regularly at the club for the

conduct of university business and include the committee on courses, which formulate many university policies dealing with instruction; the editorial committee; the board of research, which considers the allotment of university funds for scientific purposes; the committee on admissions; the university council; the committee on music and drama. The Cosmos Club and the Berkeley Club, composed of members of the teaching staff of the university, meet regularly at the club and the purposes of their meeting are scientific or literary.

At the Faculty Club of the University of California, teaching fellows, assistants and graduate scholars working for higher degrees have an opportunity to come into closer contact with their professors. To encourage such contacts, these classes of applicants for membership have been exempted from the payment of an initiation fee, with the result that the more formal instruction of the classroom and laboratory are usually continued informally at the Faculty Club of the University of California. Officers of administration very often entertain at the Faculty Club of the University of California official guests of the university.

The Faculty Club of the University of California permits its quarters to be used without charge as a meeting place of the above various educational groups, faculty meetings, and other bodies involving extra curriculum activities.

The club furthers the educational interests of the university by furnishing a gathering place for members of the faculty, who there find an opportunity for the discussion of educational problems and matters affecting the university welfare. The club is regarded as a vital and essential factor in the life of the university.

VI. The building occupied by the club stands on land which is a part of the university campus, though the building was erected from funds raised by club members. No rent is charged by the university for the use of the land, which is the most beautiful section of the campus and one particularly accessible as a gathering place. No rental is charged and no taxes are paid, since the building occupies ground belonging to the university. The university furnishes half of the steam used free.

Opinion of the Court

In the clubhouse are comfortable lounging and reading rooms, dining rooms, kitchen, billiard room, with two billiard and two pool tables, cigar stand and office, servants' quarters, and about twenty bed rooms, which are rented chiefly by bachelor members of the faculty. The dining rooms are used by members and their guests, women being admitted to three of them, and a lounge is provided for the use of women. Facilities are afforded for cards and chess, and a tennis court is at the exclusive disposal of members of the club. There is a library of less than one hundred volumes, but periodicals are supplied. Tennis and billiard tournaments are held, as are occasional dances, musicales, and lectures. Dinners are given from time to time to guests deemed worthy of being entertained.

The club serves as a meeting place and a lounging place for members of the faculty and such other members of the club as are eligible under the rules, and it is possible for some club members to eat, sleep, and find as much of their social diversion as they see fit in the clubhouse.

The social features of the club are a material purpose of the organization.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

The question for determination in this case is whether or not the Faculty Club of the University of California is a social club within the intent and meaning of section 801 of the revenue act of 1921, 42 Stat. 291, and section 501 of the act of 1924, 43 Stat. 253. The pertinent provision of each of said acts imposes a tax on the amount paid as initiation fees, or dues, "to any social, athletic, or sporting club or organization." It is provided in article 4 of Treasury Regulation 43, that "every club or organization having social, athletic, or sporting features, is presumed to be included within the meaning of the phrase 'any social, athletic, or sporting club or organization,' until the contrary has been proved, and the burden of proof is upon it." Article 5 of the same regulation provides that "any organization which

maintains quarters, or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a 'social * * * club or organization,' within the meaning of the act, unless its social features are not a material purpose of the organization, but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business."

The Faculty Club of the University of California was organized in 1902; it was an outgrowth of a dining association. Its charter provides as follows: "The name of this organization shall be the Faculty Club of the University of California. Its object shall be to promote mutual acquaintance and fellowship among the officers of instruction of the university." The building occupied by the club is situated on land which is a part of the university campus. It was erected from funds provided by its members. There are lounges and reading rooms, dining rooms, a billiard room with two billiard and two pool tables, a kitchen, cigar stand, and office, servants' quarters, and twenty bedrooms, which are rented and occupied by bachelor members. The dining rooms are used by members and their guests. A lounge is provided for women who are occasional guests; facilities are provided for card games and chess games; periodicals are available, and a tennis court is provided for the exclusive use of members. Tennis and billiard tournaments are held, as well as dances, musicales, and lectures. Special dinners are given for guests who are deemed worthy of being entertained. The club serves as a convenient and comfortable meeting place for members of the faculty and such other members of the club as are eligible under the rules. The active membership consists of members and officers of the board of regents and of the faculty of the university. There are also associate, nonresident, transient, and honorary members. The predominant purpose of this club as described in its constitution is to *promote mutual acquaintance* and *fellowship among the officers of instruction of the university*. This is plainly the expression of a purely social purpose. It should be noted also that article 2 of the constitution provides: "By unani-

mous vote the board of directors may elect to associate membership persons who would be of assistance in club entertainments by virtue of their special talents." While this club undoubtedly serves an important administrative use by members of the faculty and officers of the university, and furnishes a medium for a wide range of academic activities, it is not an essential adjunct to the university. It is shown in the evidence that all the work now performed in the club could be done without such a club. However, a social club of this nature must unquestionably have a very definite value in the promotion of the general welfare of this great university. To hold that "*its social features are not a material purpose of the organization*," or that its purposes and activities are "*merely incidental* to the active furtherance of a *different* and *predominant* purpose," would be contrary to the declared purposes of its organization and to the usual and customary social activities of the club throughout the twenty-six years of its existence. The court has reached the conclusion that the Faculty Club of the University of California is a social club within the meaning of the taxing statutes. It is adjudged and ordered that plaintiff's petition be dismissed.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.



ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

RICHMOND SCREW ANCHOR CO. v. UNITED STATES

[61 C. Cls. 397; 275 U. S. 331]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

1. Patent No. 1,228,120, issued May 29, 1917, to Lenke for a cargo beam capable of moving on a horizontal axis so as to present its full strength in the line of stress, thus permitting the use of less metal than was required for the fixed beam of the prior art, and saving expense in installation—*held* valid.
2. Where two reasons are given in an opinion for the same decision, neither is *obiter dictum*.
3. Rev. Stat. § 3477, forbidding assignments of claims against the United States prior to allowance, liquidation and issuance of a warrant for payment, applied to claims for infringement of a patent.
4. The right to recover for past infringement of a patent by a private party is assignable with the patent.
5. Under the act of June 25, 1910, where a patented article was made for the United States by a contractor, unauthorized by the patent owner, and used by the United States, the patent owner had an assignable right of action for the infringement against the contractor; and a claim against the United States for reasonable compensation for the use, assertable in the Court of Claims, but subject to the provisions of Rev. Stats. 3477 forbidding assignments.
6. Under the act of July 1, 1918, which did away with the remedy against the contractor in such cases, and confined the patent owner to a suit against the United States in the Court of Claims for "recovery of his reasonable and entire compensa-

Syllabus

tion for such use and manufacture," the claim of the patent owner against the United States for manufacture and use occurring since the date of the act, is assignable with the patent, notwithstanding the sweeping terms of Rev. Stats. § 3477.

7. Federal statutes should be so construed as to avoid serious doubt of their constitutionality.
8. The special intent to prevent such assignments, deducible from the later statute and its history, though not expresed, must prevail over the broad general terms of the earlier one forbidding assignments.

Mr. CHIEF JUSTICE TAFT delivered the opinion of the Supreme Court January 3, 1928.

CASES DECIDED

IN

THE COURT OF CLAIMS

FEBRUARY 21, 1928, TO MAY 31, 1928

INCLUSIVE, IN WHICH JUDGMENTS WERE RENDERED BUT NO OPINIONS DELIVERED

No. D-538. FEBRUARY 21, 1928

Alfred J. Brooks.
Failure and refusal to sell shipyard. Dismissed.

No. F-1. FEBRUARY 27, 1928

Alester G. Alexander.
Readjustment of retired pay, warrant officer, Army. Dismissed.

No. B-144. MARCH 5, 1928

Chicago, Rock Island & Pacific Railway Co.
Transportation of military impedimenta, Army. Dismissed.

No. D-245. APRIL 2, 1928

Chicago & North Western Ry. Co.
Transportation of troops, Army. Dismissed.

No. E-616. APRIL 2, 1928

Henry W. Ulmo.
Difference in pay, Officers' Training Camp. Dismissed.

No. E-37. APRIL 2, 1928

Norfolk Awning & Tent Co.
Contract for tents, War Department. Dismissed.

No. E–566. April 2, 1928

Detroit, Toledo & Ironton R. R. Co.
Transportation of oil, U. S. Shipping Board. Dismissed.

No. D–849. April 2, 1928

Leonard B. Zeisler, trustee.
Contract for axes, War Department. Dismissed.

No. D–838. April 2, 1928

L. Margulies & Son.
Contract for clothing. Dismissed.

No. E–72. April 2, 1928

M. E. Kinsley.
Damage to vessel under charter. Dismissed.

No. D–325. April 16, 1928

Nashville, Chattanooga & St. Louis Ry. Co.
Transportation of military impedimenta, $1,044.60.

No. D–1054. April 16, 1928

John H. Coulter.
Pay as candidate for commission, U. S. Army. Dismissed.

No. E–477. April 16, 1928

George W. Hutton.
Pay as candidate for commission, U. S. Army. Dismissed.

No. D–303. April 16, 1928

Henry J. Lucke.
Professional legal services. (See 60 C. Cls. 1031.) Dismissed.

No. H–399. April 23, 1928

Ernest Peter Vincent.
Infringement of patents. Dismissed.

No. J–50. April 23, 1928

Edward E. Wall.
Removal from postal service. Dismissed.

No. C-970. APRIL 23, 1928

St. Louis, San Francisco & Texas Ry. Co.
Transportation of freight to Camp Bowie, Texas, $58.28.

No. E-381. APRIL 23, 1928

Michigan Central Railroad Co.
Transportation of freight to Camp Custer, Mich., $5,765.03.

No. C-1062. APRIL 30, 1928

New Orleans, Texas & Mexico Ry.
Land-grant deductions under act of October 6, 1917, $167.75.

No. C-1070. APRIL 30, 1928

J. L. Lancaster and Charles L. Wallace, receivers of the Texas & Pacific Ry. Co.
Land-grant deductions under act of October 6, 1917, $686.75.

No. F-174. APRIL 30, 1928

Elmer J. McCluen.
Mileage for travel under orders, Navy, $253.52.

No. E-591. APRIL 30, 1928

Benjamin F. Staud.
Mileage for travel under orders, Navy, $267.60.

No. 34753. MAY 28, 1928

El Paso & Southwestern Co. et al.
Transportation of freight, $4,516.02.

No. E-597. MAY 28, 1928

Carroll Electric Co., a corporation.
Deduction for alleged indebtedness of partnership, $7,127.89.

No. D-765. MAY 28, 1928

Mason & Hanger Contracting Co.

Construction of port terminal; premium for bond as part of cost, $2,500.

CASES PERTAINING TO REFUND OF TAXES DISMISSED BY THE COURT OF CLAIMS

ON FEBRUARY 27, 1928

E-494. A. G. Robinson.

ON FEBRUARY 28, 1928

F-206. Paul J. Bertelsen, receiver.

ON MARCH 5, 1928

H-171. Cuba Company.

ON APRIL 2, 1928

D-873. Sol Roos.
E-131. Frederick Winthrop.
E-468. Pond Laundry Co.
E-550. Campbell Paper Box Co. et al.
F-259. Superheater Co.

ON APRIL 16, 1928

E-585. Arthur K. Bourne et al.
H-1. Frank B. Bemis et al.

ON APRIL 19, 1928

D-777. Johnson Bros. Co.

ON APRIL 30, 1928

F-176. William S. Moore et al.
F-189. Hodges Carpet Co.
F-277. Weber Bros. Shoe Co.
H-363. North Packing & Provision Co.

ON MAY 28, 1928

E-303. Spencer Penrose.
E-396. Farmers' Loan & Trust Co.
F-211. Standard Knitting Mills.
F-284. D. P. Putnam, executor.
H-177. Shenango Furnace Co.
H-331. J. H. Neubauer.
J-195. Mary A. S. Booker.
J-197. Clinchfield Coal Corporation.

ON MAY 29, 1928

H-14. Otto H. Kahn.

ON MAY 31, 1928

F-334. Edward C. Cammann et al.

CASES OF UNIFORM GRATUITY DISMISSED BY THE COURT OF CLAIMS

ON APRIL 2, 1928

C-553. Douglas L. McBride.
E-210. Richard B. Blackwell.
C-876. Lawrence V. Morrill, jr.

ON APRIL 16, 1928

C-509. Robert B. Team.
D-320. Otto W. Grisier.
D-280. William E. D. Stokes.

ON MAY 28, 1928

C-829. John R. Minter.



INDEX DIGEST

CONTRACTS—Continued.

Secretary of the Navy with a statement that the increase of cost occasioned thereby would be taken up later. In compliance with the Secretary's request the shipbuilder employed overtime and by agreement the Government was at all times kept informed of the amount thereof. *Held*, that this, in light of the policy of the Navy Department showing an intention to make reimbursement in such cases, was evidence of an agreement to reimburse the contractor the excess cost of such overtime. *New York Shipbuilding Co.*, 457.

X. Where a shipbuilder, having under construction in its yards ships for the Emergency Fleet Corporation under cost-plus contracts, on which it was required under an award of the Shipbuilding Labor Adjustment Board to pay increased wages, by reason thereof found it necessary to make corresponding increases in work on a fixed-price contract for the construction of a battleship, and was informed by the Secretary of the Navy that his department expected to pay unavoidable increases in cost due to adoption of the new wage scale, there was an agreement to reimburse the contractor such increases on the fixed-price contract. *Id.*

XI. (1) An advertisement for bids, made part of a contract for dredging, provided that "the material to be removed is believed to be sand, clay, gravel, and boulders, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description." The cost of a complete and thorough examination of the work between advertisement and bidding was prohibitive and the successful bidder, believing the description given in the advertisement to be accurate, relied upon it and bid accordingly, but before entering into the contract inquired of the Government's representative as to the nature of the material to be dredged and was given no information beyond that contained in the advertisement, although the said representative knew that hardpan would be encountered, necessitating difficult and costly excavation. *Held*, that the contractor was entitled to recover the additional cost of excavating the hardpan.

(2) During the course of the work above described the contractor requested additional compensation or relief from the contract, which requests were refused, and was also refused payment of the stipulated price unless certificates were furnished from time to time, limiting the description of the material dredged to "stiff clay"

TAXES—Continued.

business with subscribers in 27 States of the Union, is not an "organization of a purely local character," and where a part of its income is derived from the investment of deposits, its income does not consist "solely of assessments, dues, and fees" (sec. 11 (a), Tenth, revenue act of 1916; sec. 231 (10) revenue act of 1918.) *Hardware Underwriters et al.*, 267.

XV. The will of plaintiffs' testator, after directing that certain payments should be made from the income of his estate, provided: "I direct my trustees to hold and invest and * * * reinvest all the remainder of such income and to hold and retain the same and all accumulations thereof in order that said trust fund may increase and keep the same intact until my said three children * * * shall respectively arrive at the age of twenty-five years, dividing the said trust fund, however, into three equal parts, one of the said parts to be so held for each of my said children, respectively, and in adding to such fund * * * income of my estate * * * I direct that such additions shall be made equally to each of said three parts and as my said children shall respectively arrive at the age of twenty-five years the principal of such portion of said accumulated fund so held for such child shall be paid to such child or the lawful issue thereof." *Held*, that the trust so created was that of one fund, the provision for dividing it being merely directory, and that an assessment by the Commissioner of Internal Revenue of income tax against the estate on the basis of one trust, taxable as an entity, instead of three separate trusts, was correctly made. *Johnson, jr., et al., beneficiaries*, 285.

XVI. Stuffed dates, prepared by removing the seed and inserting in the place thereof a half of a kernel of a pecan and then rolling the date in or sprinkling it with granulated sugar, are not candies, and are not subject to the excise tax provided in subdivisions (9) and (6), respectively, of section 900 of the revenue acts of 1918 and 1921. *Funsten Co.*, 292.

XVII. Where a claim for refund of taxes, not on the printed form provided for by the Bureau of Internal Revenue, contains all the essential information required to be set out in said form, and was considered and allowed by the Commissioner of Internal Revenue, it sufficiently complies with the requirements of a claim as contemplated by statute and the taxpayer is











